The Prosecutor's Manual Volume I

Chapter 3

Search and Seizure

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I. INTRODUCTION

This chapter discusses the admissibility of evidence obtained as a result of a warrantless "search" or "seizure".

Admissibility is controlled by the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

The courts enforce the Fourth Amendment through the exclusionary rule, which excludes (suppresses) from the State's case-in-chief most evidence seized in violation of the Fourth Amendment. The other method of enforcement is through civil lawsuits, perhaps under 42 U.S.C. § 1983 *et seq*. The rest of this chapter deals only with the exclusionary rule, although violations which result in exclusion of evidence may give rise to civil liability as well. Indeed, the United States Supreme Court imposed liability on a county when the sheriff called the county prosecutor and asked what to do when a third party would not let them in to serve capiases. The prosecutor told them "to go ahead and serve them," and the county could be liable for that "policy" decision. *Pembaur v. Cincinnati,* 475 U.S. 469, 480, 106 S.Ct. 1292, 1298 (1986).

In the good news department, the United States Supreme Court, the Arizona Supreme Court, and the legislature have all enacted or adopted good faith exceptions to the exclusionary rule. A.R.S. § 13-3925; *United States v. Leon,* 468 U.S. 897, 922, 104 S.Ct. 3405, 3420 (1984); *State v. Bolt,* 142 Ariz. 260, 267, 689 P.2d 519, 526 (1984).

Be aware that Arizona courts have not always followed federal search and seizure law. Although, under federal law, courts have recognized an inevitable discovery doctrine permitting the admission of evidence obtained in an illegal search, the Arizona Supreme Court has limited the availability of that doctrine as applied to illegal searches of the home. The Arizona Supreme Court relied on Art. 2, Sec. 8 of the Arizona Constitution in declining to extend the inevitable discovery doctrine into a defendant's home. *State v. Ault,* 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986).

II. SUPPRESSION HEARINGS

A. When a Suppression Hearing May be Held

A suppression hearing for the purpose of precluding the state from offering evidence garnered from an allegedly unconstitutional search and/or seizure is usually precipitated by the filing of a written motion to suppress.

1. Timeliness

Motions to suppress must be filed twenty days before the trial date, unless the defendant could not reasonably have known of the grounds for the motion and exercised due diligence in filing the motion. Rule 16.1, Ariz. R. Crim. P. Failure to file the motions will result in their preclusion. Rule 16.1(c), Ariz.

R. Crim. P. The twenty days is twenty days prior to the first scheduled trial date. *State v. Stewart*, 139 Ariz. 50, 53, 676 P.2d 1108, 1111 (1984); *State v. Superior Court (McKenzie)*, 127 Ariz. 175, 176, 619 P.2d 3, 4 (1980). *But see generally*, *State v. Vincent*, 147 Ariz. 6, 7, 708 P.2d 97 98 (App. Div. 2 1985) (judge has discretion, preclusion should be used sparingly).

2. Substance

Motions to suppress "shall contain a short, concise statement of the precise nature of the relief requested (and) shall be accompanied by a brief memorandum stating the specific factual grounds therefore and indicating the precise legal points, statutes, and authorities relied upon...." Rule 35.1(a), Ariz. R. Crim. P.

"Argument of counsel is not evidence. Among other things, sworn affidavits, stipulated facts, depositions, and oral testimony might be introduced to support a claim of disclosure or to counter such a claim." *State v. Grounds*, 128 Ariz. 14, 15, 623 P.2d 803, 804 (1981).

Defendant did not meet this burden by attaching a copy of the police reports to the motion and the trial court erred when it suppressed on that basis. *State v. Fimbres*, 152 Ariz. 440, 733 P.2d 637, 638 (App. Div. 2 1986).

3. Preliminary Hearings

Motions to suppress may not be raised at a preliminary hearing, nor may issues properly raised at a suppression hearing be raised. Rule 5.3(b), Ariz. R. Crim. P.

Questions of state witnesses which appear to be "fishing expeditions" in anticipation of a suppression hearing should be opposed. The purpose of the preliminary hearing is not to provide discovery. *State v. Clark*, 126 Ariz. 428, 432, 616 P.2d 888, 892 (1980).

B. Burden of Proof

1. Preponderance of Evidence

The State is required to prove the lawfulness of search or seizure by a preponderance of the evidence. Rule 16.2(b), Ariz. R. Crim. P. *State v. McMahon*, 116 Ariz. 129, 132, 568 P.2d 1027, 1030 (1977); *State v. Winters*, 27 Ariz.App. 508, 513, 556 P.2d 809, 814 (App. Div. 1 1976).

2. Burden of Going Forward

The state does not have any burden at the motion to suppress until the defense complies with Rule 16.2(b) and "comes forward with evidence of specific circumstances which establish a *prima facie* case that the evidence taken should be suppressed." This is called the burden of going forward. The burden of going forward requires the production of sufficient preliminary evidence before the party with the burden of persuasion must proceed with its evidence. *State v. Hyde*, 186 Ariz. 252, 266, 921 P.2d 655, 669 (1996).

a. Search Warrants and Discovery

> [W]henever the defense is entitled under Rule 15 to discover the circumstances surrounding the taking of any evidence . . . search and seizure, or defense counsel was present at the taking, or the evidence was obtained pursuant to a valid search warrant, the prosecutor's burden of proof shall arise only after the defendant has come forward with

evidence of specific circumstances which establish a *prima facie* case that the evidence taken should be suppressed.

Rule 16.2(b), Ariz. R. Crim. P. *State v. Fimbres,* 152 Ariz. 440, 441, 733 P.2d 637, 638 (App. Div. 2 1986) (attaching police reports to motion insufficient); *State v. Lopez,* 115 Ariz. 40, 563 P.2d 295 (App. Div. 2 1976). Once defendant establishes that items were not described in search warrant, the state has burden of proof to show property was legally seized. *Search Warrants C-419847 & C-419848 v. State,* 136 Ariz. 175, 665 P.2d 57 (1983).

b. Method of Contesting

The defendant fulfills this burden of going forward by producing "sufficient admissible evidence to raise the issue". *State v. Kelly,* 210 Ariz. 460, 112 P.3d 682 (App. Div. 2 2005). *See generally State ex rel Collins v. Riddel,* 133 Ariz. 376, 651 P.2d 1201 (1982) (arguments of counsel are not evidence).

c Burden of Production

Because warrantless searches are presumptively unreasonable under the Fourth Amendment, the defendant meets his burden of production and establishes a prima facie case for suppression by establishing the presumptive invalidity of the search. Arellano v. Rodriguez, 194 Ariz. 211, ¶ 10, 979 P.2d 539 (App. Div. 1 1999).

"Appellee did not carry his burden of proof by showing his possessory interest in the shed and therefore the trial court erred in suppressing the evidence seized from the shed." *State v. Harris,* 131 Ariz. 488, 490, 642 P.2d 485, 487 (App. Div. 2 1982). *Accord Fimbres, supra.*

3. Duties and Discretion of Judge

a. Legal Issues

The constitutionality of a search or seizure is a matter of law for the court to decide.

b. Findings

Although it is preferable that the court make specific findings, it has been held 'that by denying a motion to suppress, the court implies that the evidence has been lawfully seized based on the evidence presented. *State v. Myers,* 117 Ariz. 79, 570 P.2d 1252 (1977).

c. Discretion

The court's ruling on suppression issues will not be disturbed on appeal unless there is a clear abuse of discretion. *State v. Winegar,* 147 Ariz. 440, 711 P.2d 579 (1985); *State v. Schulte,* 117 Ariz. 482, 573 P.2d 882 (1977); *State v. Greenawalt,* 128 Ariz. 150, 624 P.2d 828 (1981), cert. denied 102 S.Ct. 364.

C. Hearsay Testimony

Hearsay testimony is admissible at motions to suppress. *State v. Keener,* 110 Ariz. 462, 464, 520 P.2d 510, 513 (1974); *State v. Pederson,* 102 Ariz. 60, 424 P.2d 810 (1967); Rule 104, Ariz. R. Evid.

D. Testimony by the Defendant

A defendant may testify at a suppression hearing. This testimonymay not be used by the state in its case-in-chief at trial. *Simmons v. United States,* 390 U.S. 377, 389, 88 S.Ct. 967, 974 (1968); *State v. Nadler,* 129 Ariz. 19, 628 P.2d 56, 58 (App. Div. 2 1981); Rule 16.2, Ariz. R. Crim. P.

However, if the defendant elects to testify at the suppression hearing, he may be impeached with that testimony if he later testifies at trial. *Harris v. New York*, 401 U.S. 222, 226, 91 S.Ct. 643, 646 (1970). Rule 16.2(a)(4), Ariz. R. Crim. P.; *State v. Nadler, supra.*

E. Making a Record

The importance of "making a record" at the suppression hearing cannot be overstated. Almost every prosecutor who has been around for awhile has failed to make a record on a case causing reversal on appeal. The following cases are but a few where that failure has been memorialized.

"Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." Officers went to a tavern to serve a warrant on the bartender who had been dealing drugs. Upon arrival officers frisked 9-13 patrons and found evidence on the defendant Ybarra. The principal issue on appeal was whether the officers "had a reasonable belief that he was armed". The Supreme Court found that there were no "specific facts that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous". *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342 (1976).

An officer stopped a car based upon a radio communication from San Diego that the driver was A.W.O.L. and possessed drugs. In searching the driver and his car, drugs were found and seized. At no time, either prior to or during trial, did the state introduce evidence that California had probable cause to arrest or search the defendant. The case was therefore reversed and remanded. *State v. Richards*, 110 Ariz. 290, 518 P.2d 113 (1974).

On appeal, the state attempted to justify the officers' stop of the defendants' car based upon the area of the stop (in front of a bar with a reputation for drug trafficking); the defendants were strangers in the area; young whites in the area were usually there to get narcotics or prostitutes. The Court of Appeals noted the state's facts were not supported by the record". *State v. Weitman*, 22 Ariz.App. 162, 164, 525 P.2d 293, 295 (App. Div. 1 1974).

F. Weight of the Evidence and Credibility of Witnesses

The appellate court will defer to the trial court's determination of the credibility of witnesses and the weight of the evidence presented at the hearing. *State v. Estrada*, 209 Ariz. 287, 100 P.3d 452 (App. Div. 2 2004).

G. Officer's Opinion

The officer's opinion about whether he had probable cause is irrelevant because the test is objective. *State v. Turner*, 142 Ariz. 138, 141, 688 P.2d 1030, 1033 (App. Div. 2 1984).

III. THRESHOLD QUESTION - IS THE FOURTH AMENDMENT APPLICABLE?

Before analyzing whether a particular intrusion was constitutional, a prosecutor should first ask whether the Fourth Amendment is applicable to the facts.

In analyzing this question, this section asks: Is the place, searcher, defendant, or evidence searched for covered by the Fourth Amendment?

If the answer is "no," there is no reason to raise the issue of whether a search was constitutionally reasonable. (If the Fourth Amendment is inapplicable to the facts, no "search" or "seizure" has occurred. In this section, however, the misnomer "search" is used interchangeably with the more

accurate characterization, "intrusion".)

A. Is the Place Covered by the Fourth Amendment?

The Fourth Amendment applies only to areas where a person has a reasonable expectation of privacy.

1. Curtilage Versus Open Fields

Traditionally, the areas in and around a person's home, i.e., his curtilage, have been protected by the Fourth Amendment. "Open fields," however, were not protected. *Hestor v. United* States, 265 U.S. 57, 44 S.Ct. 445 (1924); Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735 (1984). "Open fields" can include defendant's backyard viewed from a neighbor's backyard. State v. Platt, 130 Ariz. 570, 573, 637 P.2d 1073, 1076 (App. Div. 2 1982). However, this applies only to observations made from the neighbor's yard. Police are not allowed to enter the open yard, which is considered part of the curtilage. State v. Olm, 223 Ariz. 429, ¶16, 224 P.3d 245, 249 (App. Div. 2 2010).

Over 40 years after the "open fields" doctrine was propounded, the Supreme Court in *Katz v. United States*, 389 U.S. 374, 361, 88 S.Ct. 506 (1967) held that "the Fourth Amendment protects people, not places". (Emphasis added.) The new issues were both subjective and objective:

a. Person's Subjective Expectation Matters Little

In general, this question has turned out not to be dispositive. Although *Katz* applied the Fourth Amendment to prevent bugging a phone booth, the most determined efforts to shield open fields has mattered little to the court. In *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735 (1984), the defendant posted no trespassing signs and, although someone yelled at the officers not to go on, the trespass by the officers did not violate the Fourth Amendment. Likewise, while people subjectively had a reasonable expectation of privacy in backyards surrounded by high walls, the court upheld naked eye visual surveillance from 1000 feet up in an airplane. *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986).

b. Objective Reasonableness Decisive

> [A] 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate'. His presence ... is 'wrongful'; his expectation is not 'one that society is prepared to recognize as 'reasonable'.

Rakas v. Illinois, 439 U.S. 128, 143 fn 12, 99 S.Ct. 421, 430 fn 12 (1978) (internal citations omitted). *See also State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981).

The United States Supreme Court has moved to an almost exclusively objective test of the reasonableness of the expectation of privacy in *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134 (1987). In *Dunn*, the perimeter of defendant's property was fenced, with various inner fences. The barn was located 60 yards from the house, and both were surrounded by their own fences. Officers put a chemical beeper in a drum of precursor chemicals defendant ordered. Crossing four fences, the officers shined a flashlight into the partially open barn and observed a drug manufacturing setup. Their observations were lawful because they were on "open fields," instead of the curtilage of the home, according to the court's four part test. The United States Supreme Court allowed the convictions to stand although the officers were trespassing. *Dunn* also upheld the use of a flashlight from open fields.

Prior to *Dunn*, Arizona cases relied on the factor of whether the area was one where the general public was apt to wander. *State v. Caldwell*, 20 Ariz.App. 331, 512 P.2d 863 (App. Div. 2 1973). If the public could be there, the defendant was out of luck. *State v. Lopez*, 115 Ariz. 40, 563 P.2d 295 (1977) (officers smelled marijuana from outside defendant's garage); *State v. White*, 118 Ariz. 47, 547 P.2d 840 (App. Div. 2 1 977)(no reasonable expectation in airplane on someone else's landing strip).

c. Places Applicable

The concept of reasonable expectation of privacy is inherent in every search and seizure case and encompasses a potentially infinite number of 'places'.

As will be discussed in greater detail, *infra*, if the place and circumstances reflect that the person has a reasonable expectation of privacy in the area searched, he can claim Fourth Amendment protection. This can be overcome by the state only if the search was conducted under authority of a warrant or if it falls within one of the exceptions to the warrant requirement.

For illustrative purposes, the following 'places' are set out as interesting and recently debated examples of when and to what extent a person may claim Fourth Amendment protection:

(1) Luggage

Luggage depends on the circumstances. If the luggage is in a vehicle and the police have probable cause to believe the vehicle contains contraband, the officers may search the vehicle and any containers therein which could contain the contraband, *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157 (1982). The entire passenger compartment and any luggage therein can be searched incident to an arrest. *State v. Crivellone*, 138 Ariz. 437, 675 P.2d 697 (1983).

(2) Physical characteristics

There is no reasonable expectation of privacy in physical characteristics, therefore there is no search or seizure when taken. *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764 (1973) (voice); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966) (blood); *State v. Coleman*, 122 Ariz. 130, 593 P.2d 684 (App. Div. 2 1978), judgment affirmed in part and disapproved in part, 122 Ariz. 99, 593 P.2d 653. (tread mark on shoes).

(3) Use of Dog

The use of a dog's keen sense of smell to provide probable cause to search is well settled. It is really nothing more than using a flashlight to better see evidence. There is no search for constitutional purposes because when the dog smells the evidence and alerts, he is "outside" the area wherein a person can reasonably expect privacy. *State v. Morrow*, 128 Ariz. 309, 625 P.2d 898 (1981); *United States v. Beale*, 736 F.2d 1289 (9th Cir. 1984); *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637 (1983).

(4) Places

Although a defendant has an expectation of privacy in a hotel room, he has none if the rental period has expired. *State v. Ahumada*, 125 Ariz. 316, 609 P.2d 586 (App. Div. 2 1980).

(5) Resealed Containers

No protected privacy interest remained in contraband in a container once the customs and drug agents had opened it. The container was then delivered to the defendant who was subsequently arrested with it. The officers could reopen the container without a search warrant, where there was no

substantial likelihood that the contents had been changed. A warrantless chemical test of a portion of the drugs was upheld. *Illinois v. Andreas*, 463 U.S. 765, 103 S.Ct. 3319 (1983); *State v. Best*, 146 Ariz. 1, 703 P.2d 548 (App. Div. 2 1985) (marijuana containers). *See generally State v. Hersch*, 135 Ariz. 528, 662 P.2d 1035 (App. Div. 2 1982) (opened briefcase).

(6) Aerial Surveillance

Naked eye surveillance of marijuana growing in a backyard, *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986) and aerial photographs of an industrial plant do not offend the constitution. *Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S.Ct. 1819 (1986).

2. Plain View (Evidence Exposed to the Public View,Hearing or Smell)

Initially, the "plain view" doctrine stated that crime-related evidence which is exposed to the public is not a subject of Fourth Amendment protection if three factors were met: (1) the officer was lawfully present in the area; (2) the discovery of the evidence was inadvertent, and; (3) the incriminating nature of the evidence must be readily apparent to the officer. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971).

However, in *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990), the Supreme Court amended the plain view doctrine to hold that, as long as law-enforcement officers are authorized to be where they are, they may seize any item in plain view if its evidentiary value is at once apparent. This new test eliminated the inadvertence requirement. *See State v. DeCamp*, 197 Ariz. 36, 40, 3 P.3d 956, 960 (App. Div. 1 1999).

a. Lawful Presence

Plain view is applicable only if the officer observes the crime related property when he is lawfully present. Remember that officers present in public places or open fields are lawfully present. Technical trespass does not count against the officers as long as they are in open fields or public places. *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134 (1987) (open fields); *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735 (1984) (property posted, officers told not to go on, evidence admitted). Arizona cases, suppressing evidence for observations from officers on open fields, are of questionable validity. *See State v. Olm*, 223 Ariz. 429, ¶16, 224 P.3d 245, 249 (App. Div. 2 2010).

An officer does not search anything if the officer is lawfully present and merely records serial numbers. A warrant or other exceptions are necessary only if the officer moves something. *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149 (1987).

(1) Presence by Request of Person Lawfully Present

An officer who is called to the scene of a crime by the victim is lawfully present. *State v. Tucker*, 118 Ariz. 76, 79, 574 P.2d 1295, 1298 (1978); *State v. Warness*, 26 Ariz.App. 359, 360, 548 P.2d 853, 854 (App. Div. 1 1976). Likewise, an officer called to the scene by the owner of the premises is lawfully present. *State v. Ahumada*, 125 Ariz. 316, 318, 609 P.2d 586, 588 (App. Div. 2 1980) (entry into motel room where rental period of occupant had expired). Officers should get a warrant before seizing anything not in plain view - here an officer called to a murder scene saw part of a handkerchief sticking from a ceiling tile, and the court suppressed the murder weapon which was wrapped in the handkerchief. *State v. Young*, 135 Ariz. 437, 441, 661 P.2d 1138, 1142 (App. Div. 1 1982).

An officer was requested to accompany wife to remove her things. Husband objected prior to officer's viewing marijuana. The seizure of plain view marijuana was upheld. *State v. Donovan,* 116 Ariz. 209, 211, 568 P.2d 1107, 1109 (App. Div. 2 1977).

Officers were called because the apartment owner was murdered and the manager had been missing for some time. The officers lawfully entered the apartment under the emergency aid doctrine. They could seize any items as justification for a search warrant. *State v. Fisher,* 141 Ariz. 227, 236, 686 P.2d 750, 759 (1984) (wait to see if any other way existed did not invalidate emergency entry), cert. denied 105 S.Ct. 549.

An officer with a warrant may seize crime-related property while searching areas named in the warrant and for items named in the warrant. *State v. Smith,* 122 Ariz. 58, 61, 593 P.2d 281, 284 (1979). *State v. Poland,* 132 Ariz. 269, 280, 645 P.2d 784, 796 (1982). (The officer can also take a burglary victim or informant with him during service of the warrant.)

2)Protective Walk-through

Once lawfully in the house, the officers could conduct a protective walk-through. Officer responding to domestic violence call lawfully entered house for protective walk-through for weapons. *State v. Greene,* 162 Ariz. 431, 433, 784 P.2d 257, 259 (1989).

"[T]he police may, under certain circumstances, make a warrantless protective sweep of a residence if they are lawfully inside the residence [and they] reasonably perceive an immediate danger to their safety." *State v. Rodriguez,* 205 Ariz. 392, 402, 71 P.3d 919, 929 (App. Div. 2 2003) citing *State v. Kosman,* 181 Ariz. 487, 491, 892 P.2d 207, 211 (App.1995) and *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093 (1990).

An officer called to a filthy house by a child services worker could tour the house looking for children. Although it was a close issue, a police photographer who arrived shortly thereafter could take pictures of what the officer saw in plain view. *State v. Smith,* 130 Ariz. 74, 75, 634 P.2d 1, 2 (App. Div. 2 1981).

3)Deceit

The fact officers used deceit by posing as home buyers to gain entrance does not make their observations illegal, as long as they do not exceed the bounds of what a person in their position would do. *State v. Poland,* 132 Ariz. 269, 277-78, 645 P.2d 784, 792-93 (1982).

4)Lawful presence and sight aids

a)Flashlight

United States v. Dunn, 480 U.S. 294, 107 S.Ct. 1134 (1987); *Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535 (1983). *State v. Nelson,* 129 Ariz. 582, 633 P.2d 391 (1981); *State v. Mosley,* 119 Ariz. 393, 581 P.2d 238 (1978); *State v. Cobb,* 115 Ariz. 484, 566 P.2d 285 (1977); *State v. Martin,* 139 Ariz. 466, 679 P.2d 489 (1984); *State v. Salazaar,* 27 Ariz.App. 620, 557 P.2d 552 (App. Div. 2 1976); *State v. Bainch,* 24 Ariz.App. 140, 536 P.2d 709 (App. Div. 2 1975).

b)Binoculars

State v. Mosley, 85 Wash.2d 120, 530 P.2d 306 (1975) (drugs seen from parking lot across the street); *Commonwealth v. Hernley,* 216 Pa.Super. 177, 263 A.2d 904 (1970) (and ladder). *People v. Clark,*

"whose contour or mass makes its identity [as contraband] immediately apparent," it may be seized without a

350 N.W.2d 754 (Mich.App. 1984) (license plate number taken when defendant opened garage door).

5) Plain Feel

If a police officer lawfully pats down a suspect's outer clothing during a *Terry* stop and feels an object warrant under the rationale behind the plain view doctrine. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 113 S.Ct. 2130 (1993).

6) Plain Smell

The Arizona Supreme Court previously held that, where police do not violate the integrity of the object, "what is seen, heard, or smelled without actually penetrating or intruding into the bag may be used as a basis for further investigation." *State v. Morrow*, 128 Ariz. 309, 313, 625 P.2d 898, 902 (1981). This holding has since been called into question by the Arizona Court of Appeals in *State v. Guillen*, 222 Ariz. 81, 213 P.3d 230 (App. Div. 2 2009). In *Guillen*, the court held that the plain smell doctrine has been limited to prohibit the use of "sense enhancing technology", i.e. drug sniffing dogs, in the home by the United States Supreme Court holding in *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001) (thermal imaging equipment). *Id*. at 87, 213 P.3d at 236. In reversing the Court of Appeals decision, the Arizona Supreme Court assumed without deciding that the dog sniff violated the dog sniff violated Article 2, Section 8, of the Arizona Constitution. *State v. Guillen*, 223 Ariz. 314, ¶16, 223 P.3d 658, 662 (2010).

b. Obviously Crime-Related

The officer who sees the items in plain view must usually have probable cause to believe them contraband, fruits or instrumentalities of crimes, etc. before the officer can seize the property. *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149 (1987). Put another way, "items seized must be tied to criminal activity, either intrinsically or through an officer's knowledge and reasonable belief." *State v. Mata*, 125 Ariz. 233, 239, 609 P.2d 48, 54 (1980). There are exceptions where operational necessities require less than probable cause. The court gave examples of detaining cars suspected of containing illegal aliens and detaining a suspected drug smuggler's luggage for a dog sniff.

(1) Cases Where Not Readily Apparent

Search warrant authorized search for narcotics and firearms. Officers looked through a box, found a bound columnar pad which referred to "dollars" and "pounds". The discovery of the contents of the pad were not immediately recognized as crime-related. Evidence suppressed. *State v. Shinault*, 120 Ariz. 213, 215, 584 P.2d 1204, 1206 (App. Div. 2 1978).

The defendant summoned officers to his apartment because he could not "wake up his friend" whom he drank with the night before. Officers, after arrival, saw that the victim's face had been cut or scratched. Numerous blood-stained articles were seized, but were suppressed because they were "not immediately connected with criminal activity, as evidenced by the delay in placing appellant under arrest." *State v. Siquieros*, 121 Ariz. 465,468, 591 P.2d 557, 560 (App. Div. 2 1978).

(2) Cases where readily apparent

Officer, while executing a valid search warrant, saw a cap and jacket which fit the description of that worn by the perpetrator of a different crime. Although the evidence was (mistakenly) suppressed, the officer was allowed to testify to what he saw. The Supreme Court affirmed. *State v. Valencia*, 121 Ariz. 191, 197, 589 P.2d 434, 440 (1979).

Defendant called officers to his apartment regarding a burglar. As officer passed a low-hanging flower

pot, he saw a tinted but not opaque prescription bottle. After picking up the bottle, he saw that there was marijuana inside. The court justified seizure in that had the officer bent down, he could have gotten just as close to the bottle. *State v. Warness*, 26 Ariz.App. 359, 360, 548 P.2d 853, 854 (App. Div. 1 1976). This case cites several other cases supporting the look-anywhere-but-don't-touch principle.

A witness told officers that someone had been shot in an apartment. The officers went into the apartment and found the victim's and defendant's clothes. By virtue of what the witness said, the clothes were "reasonably believed (to be) tied to criminal activity". *State v. Mata*, 125 Ariz. 233, 239, 609 P.2d 48, 54 (1980).

B. Is the Searcher Covered by the Fourth Amendment?

The Fourth Amendment applies only to those searches conducted by the State.

1. Searches by Private Persons

Intrusions by private persons into private areas are outside the scope of Fourth Amendment protection. Evidence illegally observed or seized by a non-governmental agent, who is not acting in concert with the law enforcement, is admissible and outside the scope of Fourth Amendment protection. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576 (1921).

2. Rationale

"The state should not be condemned for the actions of a private individual and the courts do not, by using this evidence, condone the actions of the individual." *State v. Rice*, 110 Ariz. 210, 211-212, 516 P.2d 1222, 1223-24 (1973). There seems to be a split in authority. If officers are dealing with pornographic films, they can search only as far as the private citizen(s) did. The evidence was suppressed where police officers looked at a film without getting a warrant, where the citizen had only read the obscene labels. *Walter v. United States*, 447 U.S. 649, 656, 100 S.Ct. 2395, 2401 (1980). On the other hand, the same court has allowed narcotics agents to reopen packages of drugs already opened and resealed by a private citizen. Further, the court allowed the warrantless field testing of the drugs. *Illinois v. Andreas*, 463 U.S. 765, 772, 103 S.Ct. 3319, 3324 (1983).

3.Who are Private Persons?

A search or seizure by a private citizen does not offend the Fourth Amendment unless the private citizen is acting as an agent of the state. *State v. Garcia-Navarro*, 224 Ariz. 38, 226 P.3d 407 (App. Div. 2 2010), citing *State v. Estrada*, 209 Ariz. 287, ¶ 16, 100 P.3d 452, 456 (App. Div. 2 2004). To determine whether a private citizen is acting as an agent of the state, the court must consider two elements: (1) whether the government had knowledge of and acquiesced to the party's actions and (2) the intent of the party. *State v. Martinez*, 221 Ariz. 383, ¶ 31, 212 P.3d 75, 83-84 (App. Div. 2 2009) (mother of defendant's girlfriend who spoke to prosecutor and volunteered to check her daughter's mail was not a state actor).

a. Sheriff's Posse

A member of the sheriff's posse "acting on his own behalf" searched a plane for marijuana. Court found the man to be private person. *State v. White*, 118 Ariz. 47, 52, 574 P.2d 840, 845 (App. Div. 1 1977).

b. Security Officers

In dictum, the Arizona Supreme Court suggested that private security guards act in their private capacity and not as representatives of the state. *State v. Lombard,* 104 Ariz. 598, 600, 457 P.2d 275, 277 (1969) (*Miranda* warnings case); See also *Stonehill v. United States,* 405 F.2d 738 (9th Cir. 1968).

c. Common Carriers

None of the cases discuss the private-state dichotomy. Instead, the courts rule that if there is reasonable cause or reason to believe a parcel contains contraband, the carrier may search (and may also consent to a search by officers). *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652 (1984) (removal of damaged package by federal officials was reasonable where private carrier had opened the damaged package); *State v. Best,* 146 Ariz. 1, 703 P.2d 548 (App. Div. 2 1985), *State v. Loyd,* 126 Ariz. 364, 676 P.2d 39 (1980). *State v. Pacheco,* 121 Ariz. 88, 588 P.2d 830 (1979) (bus station employee); *State v. Fassler,* 108 Ariz. 586, 503 P.2d 807 (1972) (airport employees); *In re 1966 Volkswagen Bus*, 120 Ariz. 365, 586 P.2d 210 (App. Div. 2 1978) (UPS employee).

C. Is the Defendant Covered by the Fourth Amendment?

THE QUESTION THAT PROSECUTORS SHOULD FIRST ASK IS WHETHER THE DEFENDANT HAS A RIGHT TO PROTEST THE SEARCH AND SEIZURE. Defendants can only protest violations of their own rights. The question of whether defendants can contest the search and seizure was formerly called "STANDING". A defendant got "standing" by showing that: (1) he had a proprietary or possessory interest in the place searched, (2) he was charged with a possessory offense, OR (3) was legitimately on the searched premises. *Jones v. United States*, 362 U.S. 275, 80 S.Ct. 725 (1960). A defendant charged with a possession crime had "automatic standing", which required the courts to hear any protests he made about the search and seizure.

Three United States Supreme Court cases eliminated the "standing" doctrine and substituted the test of whether the defendant had a "reasonable expectation of privacy." Along the way, the trio of cases killed off the doctrine of "automatic standing". *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978); *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547 (1980); *Rawlings v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556 (1980). Now, before the trial court can hear the merits of the charge which claims the defendant's rights were violated, the defendant must show he had a reasonable expectation of privacy, and that this reasonable expectation of privacy was violated.

The test for whether a defendant had a reasonable expectation of privacy is two-fold. First, the defendant must have had a subjective expectation of privacy. Second, defendant's subjective expectation of privacy must be one that is objectively reasonable; that is, an expectation of privacy which society is willing to recognize. Probably the clearest and earliest example of the two-fold nature of the test is found in footnote 12 of *Rakas, supra.* In footnote 12, Justice Rehnquist hypothesized a burglar burglarizing a summer cabin during the winter. While the burglar might

> have a thoroughly justified subjective expectation of privacy, ... it is not one which the law recognizes as legitimate.' His presence, in the words of *Jones,* 362 U.S., at 267, 80 S.Ct., at 734, is wrongfu; his expectation is not 'one that society is prepared to recognize as reasonable.

Rakas, 439 U.S. at 143, 99 S.Ct. at 430.

Remember: Once the prosecutor raises the issue, if the defendant does not show that he has a reasonable expectation of privacy, the courts cannot hear defendant's claim that his rights were violated, no matter how valid the claim is. Therefore, the prosecutor's first line of defense should always be to examine

whether defendant had a reasonable expectation of privacy which was violated. This issue should always be raised. Further, remember to make the defense be as specific as possible about how their rights were allegedly violated. Rule 16.2(b), Ariz. R. Crim. P. *See also People v. Jansen,* 713 P.2d 907 (Colo. 1986).

Example 1:

Defendant was a visitor at a house where officers were serving a search warrant (defendant was legitimately on the premises). The occupants were detained, perhaps illegally, and defendant's girlfriend was ordered to dump her purse, perhaps illegally.

When the police saw the drugs come from the girlfriend's purse, defendant admitted that the drugs belonged to defendant (ownership of seized item as well as being charged with a possessory crime). Held: The trial court could not hear the defendant's claims that the evidence should have been suppressed, since defendant lacked a reasonable expectation of privacy in the purse. *Rawlings v. Kentucky, supra.*

Example 2:

Defendants were storing and processing marijuana in their father's barn in a remote area. The gates on the property were kept locked. A trespassing neighbor saw the marijuana and returned to the barn with trespassing police officers. Police officers crossed a fence, found defendants at the barn and arrested them. Held: Defendants exhibited a subjective expectation of privacy since they carried on the operation in a remote area, kept gates locked and covered the barn windows with burlap. However, the defendants' expectation of privacy was not one society was prepared to recognize. Defendants did not have permission to be on that part of the ranch and they did not have permission to be processing and storing marijuana there. Therefore defendants could not contest the search and seizure, the evidence was properly admitted and defendants' convictions were sustained. *State v. Steiger*, 134 Ariz. 268, 655 P.2d 808 (App. Div. 1 1982). Note: This would be an open fields case under *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134 (1987).

Although courts will continue to look at the same factors they used to when they determined standing, the results may differ. *See State v. Johnson,* 132 Ariz. 5, 643 P.2d 708 (App. Div. 1 1981).

1 . Application in Arizona

Arizona recognizes that a defendant cannot assert the rights of a third party. *See State v. Johnson*, 132 Ariz. 5, 7, 643 P.2d 708,710 (App. Div. 1 1981); *State v. Olson*, 134 Ariz. 114, 117, 654 P.2d 48, 51 (App. Div. 1 1982).

The defendant does not have automatic standing to challenge a search in possessory offenses. The defendant must establish a legitimate expectation of privacy in the place to be searched. "Neither Article 2, Section 8, nor Arizona case law supports the extension of the privacy interests guaranteed by the Arizona Constitution to individuals who are unable to establish a legitimate expectation of privacy in the area searched." *State v. Juarez*, 203 Ariz. 441, 447, 55 P.3d 784, 790 (App. Div. 1 2002).

2. Abandonment and Standing

Arizona Courts have ruled that a person who abandons property by discarding or running away from it or denying possession or ownership has abandoned the property and, therefore, has no "standing" to object to the search or seizure of the property. *State v. Morrow*, 128 Ariz. 309, 313-14, 625 P.2d 898, 902-03 (1981).

a. Vehicles

The law is the same as it was before the standing test was abandoned. *State v. Myers*, 117 Ariz. 79, 89, 570 P.2d 1252 (1977); *State v. Elsey*, 121 Ariz. 102, 588 P.2d 844 (1978); *State v. Schutte*, 117 Ariz. 482, 573 P.2d 882 (1977); *State v. Asbury*, 124 Ariz. 170, 602 P.2d 838 (App. Div. 2 1979).

A person who runs away from his vehicle or deserts it has no "standing" to object to a search because he has abandoned his property. *State v. Taras*, 19 Ariz.App. 7, 504 P.2d 548 (App. Div. 2 1973). Defendant has no "standing" to object to the search of stolen car he was driving. *State v. Harding*, 137 Ariz. 278, 670 P.2d 383 (1983).

b.Trash

Property which a person has thrown away and placed in garbage cans behind his home are both beyond the area of expectation of privacy and abandoned. *State v. Siqueiros*, 121 Ariz. 465, 591 P.2d 557 (App. Div. 2 1979) (bloody clothes found in trash can outside apartment).

c.Denial of Ownership

A person who denies ownership has no standing. *State v. Morrow, supra; State v. Walker*, 119 Ariz. 121, 579 P.2d 1091 (1978) (luggage at airport).

d.Mail

While in jail, the defendant sent a letter to his girlfriend. Her mother opened the letter and gave a copy to her attorney, who gave it to the state. The court held that the defendant had standing to challenge the search and seizure of the letter because the intended recipient had not yet received it. *State v. Martinez*, 221 Ariz. 383, 212 P.3d 75 (App. Div. 2 2009).

Officers put a beeper in drugs in the mail, and it went to the home of a third party. The third party said it was the defendant's. While officers were getting a warrant for the defendant's home, the defendant got the package and took it into his home. The officer's fear that the defendant would find the beeper justified their entering and securing his home, until the warrant arrived, *State v. Stein*, 153 Ariz. 235, 735 P.2d 845 (App. Div. 1 1987).

Defendant possessed no privacy rights in a mail package addressed to a third party. Additionally, the defendant's status as the ultimate receiver did not create any privacy acts. *United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984).

Be careful of anticipatory search warrants where the warrant is obtained before the defendant takes the mail package back to his home. *United States v. Hendricks*, 743 F.2d 653 (9th Cir. 1984) (warrant invalid).

D. Is the Evidence Sought Covered by the Fourth Amendment?

Even though the state intrudes into areas where the defendant has a reasonable expectation of privacy, if the intrusion by the state is for the purpose of finding property that is non-criminal in nature, the intrusion should be outside the scope of the Fourth Amendment. A classic example of such intrusion is the inventory search of automobiles.

1.U.S. Supreme Court Analysis

The U.S. Supreme Court has directly confronted the issue of inventory searches.

Officers issued parking tickets to a car parked in a restricted zone. Later, the car was towed and inventoried pursuant to standard police procedures. Marijuana was discovered in the glove box. The court relied upon the Fourth Amendment requirement of reasonability of the search. The search was deemed reasonable because officers, after obtaining lawful custody of the car, are responsible for owners property and must protect themselves against claims of thefts. *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092 (1976).

2. Arizona Courts' Analysis

An inventory search of a vehicle is valid if two requirements are met: (1) law enforcement officials have lawful possession or custody of the vehicle, and (2) the inventory search was conducted in good faith and not as a subterfuge for a warrantless search. *State v. Schutte,* 117 Ariz. 482, 486, 573 P.2d 882, 886 (App. Div. 1 1977). An inventory search conducted pursuant to standard procedures is presumptively considered to have been conducted in good faith and therefore reasonable. *Colorado v. Bertine,* 479 U.S. 367, 372, 107 S.Ct. 738 (1987); *Opperman,* 428 U.S. at 372, 96 S.Ct. 3092.

A good faith search of a person's vehicle who is lawfully in police custody, is proper in order to protect the officers and the owner if other alternatives are unavailable. *State v. Walker,* 119 Ariz. 121, 579 P.2d 1091 (1978) (car illegally parked at the airport). *In Re One 1965 Econoline,* 109 Ariz. 433, 511 P.2d 168 (1973). Such good faith searches are not limited to plain view searches because the more valuable items of property belonging to the owner may be hidden rather than lying out in the open. *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2533 (1973) (suitcase in trunk); *State v. Walker,* 119 Ariz. 121, 128, 579 P.2d 1091 (1978).

a. Inventory Unnecessary

An inventory search is invalid if it is conducted solely for the purpose of discovering evidence of a crime. *State v. Davis,* 154 Ariz. 370, 375, 742 P.2d 1356, 1361 (App. Div. 2 1987).

Defendant was arrested in his house one and a half hours after exiting his car. Police admitted that the purpose of the search of defendant's car, which was legally parked in his own driveway, was to look for evidence. *State v. Dean,* 206 Ariz. 158, 161, 76 P.3d 429, 432 (2003).

After arresting the defendant for disorderly conduct, officers searched the defendant's car located in the restaurant's parking lot. The search turned up marijuana, but it was suppressed because the car was legally parked in a private lot. *State v. Bertran,* 18 Ariz.App. 579, 504 P.2d 520 (App. Div. 1 1972).

The defendant was stopped near his home and was arrested on a warrant. An inventory search of his car was unlawful because the defendant parked lawfully at the side of the street, defendant gave the keys to his minor children, and the officers failed to pursue alternatives to impoundment and inventory. *In Re One 1969 Chevrolet,* 121 Ariz. 532, 535-36, 591 P.2d 1309, 1312-13 (App. Div. 1 1979).

b. Objective Test

The two part test described above is an objective one. An officer's ulterior motives, i.e. his hope of finding crime-related property, is irrelevant to the justification of the search. *State v. Walker,* 119 Ariz.

121, 128, 579 P.2d 1091 (1978). The Supreme Court explained the good faith requirement as follows:

> We believe that there has been unnecessary confusion caused by insisting upon an either/or requirement as to the motives for inventorying the contents of the automobile. It is unrealistic to require that in justifying the inventory search the police must affirm that they had no hope or expectation of finding something incriminating. What makes an inventory search reasonable under the requirements of the Fourth Amendment is not that the subjective motives of the police were simplistically pure, but whether the facts of the situation indicate that an inventory search is reasonable under the circumstances.

In Re One 1965 Econoline, 109 Ariz. at 435, 511 P.2d at 170.

3.Fourth Amendment Applicable

As you must have inferred, most courts feel the Fourth Amendment is applicable to inventory situations, but a warrant is not necessary. Conceptually, you may feel more comfortable placing inventory searches under miscellaneous warrantless searches.

E. Probable Cause and Collective Knowledge

Probable cause is usually determined by the collective knowledge of all officers involved in the case. *State v. Keener*, 206 Ariz. 29, 32, 75 P.3d 119, 122 (App. Div. 1 2003), citing *State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985); *State v. Sardo*, 112 Ariz. 509, 514, 543 P.2d 1138, 1143 (1975); *State v. Smith*, 110 Ariz. 221, 224, 517 P.2d 83, 86 (1973); *State v. Peterson*, 171 Ariz. 333, 335, 830 P.2d 854, 856 (App. Div. 1 1991).

The principal received reports that the juvenile was a drug user and that the juvenile had gone to an area where kids went to ditch school or do drugs. The principal's lack of personal knowledge of any drug activity on the juvenile's part was insufficient to justify the principal searching the juvenile. *Matter of Pima County Juvenile Action No, 80484-1*, 152 Ariz. 431, 733 P.2d 316 (App. Div. 2 1987).

Police can take the character of the area into consideration when deciding what observed actions mean. *United States v. Trullo*, 809 F.2d 108 (1st Cir. 1987) (area affectionately known as "combat zone" for high violence, drug dealing).

IV. WARRANTLESS SEARCHES

This section discusses those warrantless searches where a defendant may legitimately claim Fourth Amendment protection. These searches are constitutionally permissible if they are "reasonable".

A. When are Warrantless Searches Reasonable?

Warrantless searches are permissible only after:

1. Lawful seizure of the person
   a. Search incident to arrest
   b. Frisk
2. An exigency
   a. Emergency
   b. "Hot Pursuit"

c. Protective Sweep
d. Probability of Destruction or Removal of Crime-Related Evidence
e. The Vehicle Exception

3. Voluntary Consent

4. Miscellaneous

a. Airport
b. Border
c. Common Carrier
d. Inventory
e. Probationers
f. Prisoners
g. Roadblocks
h. Transported in Police Vehicles
i. Schools
j. Consent Search Clause

B. Searches Incident to Arrest

1. When is a Search Incident to Arrest Permitted?

A search incident to arrest may be conducted pursuant to a lawful arrest. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034 (1969).

a. Permissible Pursuant to Any Custodial Arrest

A search may be conducted incident to any criminal offense custodial arrest (even traffic) *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467 (1973); *Gustafson v. Florida,* 414 U.S. 260, 94 S.Ct. 488 (1973); *State v. Cooper,* 130 Ariz. 348, 636 P.2d 126 (App. Div. 1 1981)(passenger in car stopped for speeding, smell of marijuana, attempted flight); *State v. Castillo,* 114 Ariz. 577, 562 P.2d 1075 (App. Div. 2 1977) (D.U.I.); *State v. DeRosier,* 133 Ariz. 154, 650 P.2d 456 (1982) (third degree trespass).

b. Search Before the Arrest

> [I]f an officer has sufficient information from which he could make an arrest as an incident to that arrest he could make a lawful search, it is not unreasonable if the officer makes the search before instead of after the arrest.... The important factors are whether the officer had probable cause before the search to make an arrest and whether the search was more extensive than would be justified as incident to an arrest.

State v. Carroll, 111 Ariz. 216, 219, 526 P.2d 1238, 1241 (1974). *See also State v. Aguirre,* 130 Ariz. 54, 633 P.2d 1047 (App. Div. 2 1981), *State v. Ochoa,* 131 Ariz. 175, 639 P.2d 365 (App. Div. 2 1981); *State v. Valenzuela,* 121 Ariz. 274, 589 P.2d 1306 (1979); *State v. Susko,* 114 Ariz. 547, 562 P.2d 720 (1977); *State v. Baker,* 26 Ariz.App. 255, 547 P.2d 1055 (App. Div. 2 1976).

c. Search Long After the Arrest

1) Property on the Defendant's Person

If the person's property could have been searched at the time of the arrest, it may be searched later. *United States v. Johns,* 469 U.S. 478, 105 S.Ct. 881 (1985) (packages taken from vehicle searched 3 days later), *United States v. Edwards,* 415 U.S. 800, 94 S.Ct. 1234 (1974) (search of defendant's clothes next day at jail); *United States v. Oaxaca,* 569 F.2d 518 (9th Cir. 1978) (seizure of defendant's shoes six months after arrest); *State v. Goettel,* 117 Ariz. 287, 572 P.2d 115 (App. Div. 1 1978) (officer returning pill bottle to defendant hours after arrest opens the bottle and finds drugs). But see State v. Davis, 154 Ariz. 370, 742 P.2d 1356 (App. Div. 2 1987) which held invalid a warrantless reading of the diary of a murderer, where the reading took place several days after a search incident to arrest and inventory.

2) Strip Searches

Strip searches incident to arrest are permissible long after an arrest because "[I]t would violate all concepts of decency to conduct such an intimate search on a public street." *State v. Magness,* 115 Ariz. 317, 565 P.2d 194 (App. Div. 1 1977). Body cavity searches call for a search warrant and a doctor.

It was excessive to strip search a defendant who was arrested for an outstanding traffic ticket and a restricted driver's license violation. *Hills v. Bogans,* 735 F.2d 391 (10th Cir. 1984). Likewise strip searches of prison visitors without, at least, reasonable grounds is unconstitutional. *Thorne v. Jones,* 765 F.2d 1270 (5th Cir. 1985).

2. What is the Scope of a Search Incident to Arrest?

The scope of a search incident to arrest is normally confined to those areas where the arrestee could get to and destroy evidence or obtain a weapon. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034 (1969); *State v. Noles,* 113 Ariz. 78, 546 P.2d 814 (1976).

In *Chimel,* the U.S. Supreme Court stated:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area within his immediate control construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

395 U.S. at 762-63, 89 S.Ct. at 2040.

a. The Person

1)Property on the Person

It is permissible to search the suspect and the property on his person at the time of the arrest. *State v. Curiel,* 130 Ariz. 176, 181, 634 P.2d 988, 993 (App. Div. 1 1981) (opaque container defendant tossed to his wife); *State v. Susko,* 114 Ariz 547, 549, 562 P.2d 720, 722 (1977); *State v. Parra,* 104 Ariz. 524, 456 P.2d 382 (1969) (searched billfold); *State v. Goettel,* 117 Ariz. 287, 572 P.2d 115 (App. Div. 1 1979) (searched pillbox).

2) Strip Searches & Cavity Searches

Strip searches incident to arrest for smuggling narcotics may be considered reasonable to prevent the introduction of narcotic paraphernalia into the jail is permissible if not performed in a manner to degrade or humiliate. A visual cavity search is also permissible. *State v. Magness,* 115 Ariz. 317, 565 P.2d 194 (App. Div. 1 1977).

Body cavity searches in prison are apparently permissible without any type of warrant, given reasonable grounds like an anonymous tip. *State v. Palmer,* 156 Ariz. 315, 751 P.2d 975 (App. Div. 2 1987) (forcible extraction of shotgun shell from bowel permissible); *State v. Bloomer,* 156 Ariz. 276, 751 P.2d 592 (App. Div. 2 1987) (voluntarily passed balloons of gunpowder).

3) Searches for other Bodily Evidence

Scrapings from under the suspect's fingernails revealed traces of his wife's skin and blood. These traces were admissible under the search incident doctrine. *Cupp v. Murphy,* 412 U.S. 291, 295-96, 93 S.Ct. 2000, 2003-04 (1973).

4) X-Rays

An X-Ray screen is considered a Fourth Amendment search which is less intrusive than a pat-down search. *United States v. Henry,* 615 F.2d 1223 (9th Cir. 1 980)(airline luggage); *United States v. Vega-Barvo,* 729 F.2d 1341 (11th Cir. 1984) (refusal to submit to scan during border search justified a twelve-hour detention).

b. Areas Within Reach of the Person

Although the law, in this area has changed at least six times in this century, it is clear now, given the rationale for a search incident, that officers may search only those areas from which a suspect could seize a weapon or destroy evidence, unless a vehicle is involved. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034 (1969); *State v. Noles,* 113 Ariz. 78, 546 P.2d 814 (1976); *State v. Vitale,* 23 Ariz.App. 37, 530 P.2d 394 (App. Div. 2 1975).

(1) Premises

a) Obtaining a weapon

In *Noles, supra,* the Arizona Supreme Court found that the search incident to arrest extended to a nightstand drawer in the motel room even though the suspect was handcuffed (behind his back), sitting on the floor and surrounded by officers. *Accord People v. Rufnagel,* 745 P.2d 242 (Colo. 1987) (search incident constitutional even if arrestee handcuffed before search).

b) Destroying Evidence

In *State v. Love,* 123 Ariz. 157, 598 P.2d 976 (1979), the Supreme Court found that approximately 300 pounds of marijuana was seized incident to arrest when one of the perpetrators was arrested in the same room as the marijuana. *See also State v. Vitale,* 23 Ariz.App. 37, 530 P.2d 394 (App. Div. 2 1975).

2) Vehicles

It was previously thought that *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981) held that if officers arrest an occupant of a vehicle they may search the entire passenger compartment (excluding the trunk) and any containers in the passenger compartment, as a search incident to that arrest. See *State v. Nelson*, 129 Ariz. 582, 633 P.2d 391 (1981).

However, the United States Supreme Court has since rejected such a broad reading of *Belton*, a case in which one officer contended with four arrestees in the vehicle. *Arizona v. Gant*, – U.S. –, 129 S.Ct. 1710 (2009). In *Gant*, the Supreme Court found that the "generalization underpinning the broad reading of [*Belton*] is unfounded. We now know that articles inside the passenger compartment are rarely within the area into which an arrestee might reach." *Id.* at -, 129 S.Ct. at 1723. Consequently, "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* (Emphasis added.)

3) Luggage or locked containers

In a warrantless search of an automobile, police may search luggage or locked containers within that automobile if they have probable cause to believe that contraband or evidence may be found within them. *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982 (1991).

The delay of three days before opening the packages, taken from the vehicle, did not infringe upon Fourth Amendment interests. *United States v. Johns*, 469 U.S. 478, 484, 105 S.Ct. 881, 885 (1985).

4) Billfolds

In *State v. Parra*, 104 Ariz. 524, 526, 456 P.2d 382, 384 (1968), officers used rent receipts discovered in the suspect's billfold to obtain a search warrant. The Supreme Court justified the search under the search incident exception. *See also State v. Susko*, 114 Ariz. 547, 549, 562 P.2d 720, 722 (1977) (searched billfold incident to traffic arrest); *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788 (1967).

C. Stop and Frisk

1. When is a frisk permitted?

a. United states Supreme Court and Past Crimes

> [T]here must be narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual * * * The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. * * * And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch', but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Terry v. Ohio, 88 S.Ct. 1868, 1883, 392 U.S. 1, 27 (1968) (internal citations omitted).

"The narrow scope of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked." *Ybarra v. Illinois*, 444 U.S. 85, 94, 100 S.Ct. 338, 343 (1979).

Police officers may make a *Terry* stop to briefly investigate completed crimes. Police officers may rely on bulletins to make such a stop, as long as the officers who issued the bulletin had reasonable suspicion to justify the stop. *United States v. Hensley,* 469 U.S. 221, 230-31, 105 S.Ct. 675, 681-82 (1985).

b. Arizona Cases

During a proper stop, the suspect began to walk away, the officer turned the suspect around and felt something hard. The touching of the hard object gave reasonable suspicion to frisk. *State v. Doyle,* 117 Ariz. 174, 177, 571 P.2d 671, 674 (1977).

A deputy frisked the defendant pursuant to departmental policy prior to transporting him to the scene of an accident from which the defendant had fled. "We agree that whenever an individual is to be transported in a police vehicle, a pat down search is reasonable, proper, and lawful for the protection of the officer." *State v. Smith,* 112 Ariz. 531, 534, 544 P.2d 213, 216 (1975).

During a proper stop, the suspect became belligerent making the officer feel "that a physical encounter was going to take place". *State v. Nichols,* 26 Ariz.App. 455, 458, 549 P.2d 235, 239 (App. Div. 2 1976).

Suspect came out of apartment in which a disturbance had been reported by the manager. The apartment complex was notorious for violent crimes. The frisk of the suspect was proper. *State v. Dixon,* 24 Ariz.App. 303, 305, 537 P.2d 1361, 1363 (App. Div. 2 1975).

c. Companions

Police may frisk companions of the arrested person for weapons. *State v. Clevidence,* 153 Ariz. 295, 298, 736 P.2d 379, 382 (App. Div. 1 1987) (companion recognized as potentially dangerous). In *United States v. Bell,* 762 F.2d 495 (6th Cir. 1985), defendant's passenger was defiant and refused to put his hands on the dash. *Accord United States v. Berryhill,* 445 F.2d 1181 (9th Cir. 1971). The court upheld a frisk of the companion. It is permissible also to ask the companion his name and age during a traffic stop. *State v. Ybarra,* 156 Ariz. 275, 751 P.2d 591 (App. Div. 2 1987).

Finally, it is all right to delay passengers where the delay is only incidental to the proper stop and frisk of the driver. *State v. Curiel,* 130 Ariz. 176, 634 P.2d 988 (App. Div. 1 1981).

d. Opposite Sex Frisks

If an officer has reasonable grounds to frisk a member of the opposite sex, the officer should do the frisk immediately. Moving the person to another place to have an officer of the same sex perform the frisk will not be considered a continuation of the *Terry* stop. *State v. Winegar,* 147 Ariz. 440, 711 P.2d 579 (1985).

2. Scope of the Frisk

It was originally thought that the scope of a frisk was limited to a "pat down" of the outer clothing of a suspect. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968).

However, because the rationale for frisk is the protection of the officer from the potential of a suspect's reaching a weapon, the trend has been to extend the scope to areas within reach of the suspect which might contain a weapon. This would make the frisk perimeter coextensive (not coextensive, though)

with the search incident perimeter.

Examples of cases standing for this proposition are:

a. Frisk of Brief Case or Bag

State v. Damon, 18 Ariz.App. 421, 424, 502 P.2d 1360, 1363 (App. Div. 2 1972) (looked in hand carried bag during airport search).

b. Frisk of Car

State v. Payan, 148 Ariz. 293, 714 P.2d 463 (App. Div. 2 1986) (lead car's actions gave grounds to stop load car); *State v. Phillips,* 16 Ariz.App. 174, 175, 492 P.2d 423 (App. Div. 1 1972); *State v. Waggoner,* 139 Ariz. 443, 679 P.2d 89 (App. Div. 2 1983); "We believe the situation in this case is analogous to the stop and frisk situation sanctioned by *Terry v. Ohio,* 392 U.S. 1 (1968)" *People v. Cassese,* 47 Misc. 1031, 263 N.Y.S.2d 734, 737 (1965).

c. Frisk of Suspect's Companions

State v. Clevidence, 153 Ariz. 295, 736 P.2d 379 (App. Div. 1 1987); *State v. Warren,* 124 Ariz. 279, 603 P.2d 550 (App. Div. 2 1979). *See also U.S. v. Pons,* 484 F.2d 919 (4th Cir., 1973) (shoulder bag); *U.S. v. Berryhill,* 445 F.2d 1189 (9th Cir. 1971).

d. Beyond "Pat-Downs"

Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921 (1972) (officer reached for defendant's gun in waistband without frisking him first); *United States v. Hill,* 545 F.2d 1191 (9th Cir., 1976) (officer lifted defendant's shirt when he saw a bulge without frisk first).

If a police officer lawfully pats down a suspect's outer clothing during a *Terry* stop and feels an object "whose contour or mass makes its identity [as contraband] immediately apparent," it may be seized without a warrant under the rationale behind the plain view doctrine. *Minnesota v. Dickerson,* 508 U.S. 366, 375-76, 113 S.Ct. 2130 (1993).

3. Frisk and Questions

A frisk before questioning a person does not turn a stop into a custody arrest. *People v. Morales,* 484 N.E.2d 124 (N.Y. 1985). Merely giving *Miranda* warnings does not constitute an arrest. *State v. Rowland,* 172 Ariz. 182, 184-85, 836 P.2d 395, 387-98 (App. Div. 2 1992).

However, giving a suspect *Miranda* after moving her from the place where she was initially stopped turns the stop into an arrest. *State v. Winegar,* 147 Ariz. 440, 711 P.2d 579 (Ariz. 1985).

4. Handcuffs

Frisking and handcuffing a person in a dangerous situation does not result in an arrest. "The use of force does not transform a stop into an arrest if the situation explains an officer's fears for his personal safety. An officer may take reasonable measures to neutralize the risk of physical harm and determine whether the person detained is armed." *State v. Romero,* 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. Div. 1 1993), citing *Terry,* 392 U.S. at 24, 88 S.Ct. at 1881; *State v. Aguirre,* 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App. Div. 2 1981).

Police arrested one person in the car and recognized the companion as a recently released number of a prison gang. A pistol was discovered in the car. The companion was handcuffed but not arrested when drug paraphernalia was found either by consent or a second frisk of a trucker's wallet attached to defendant's belt. *State v. Clevidence,* 153 Ariz. 295, 298, 736 P.2d 379, 382 (App. Div. 1 1987).

5. Less Intrusive Alternatives

When frisking people, police do not have to nor use less intrusive alternatives. *State v. Clevidence,* 153 Ariz. 295, 298, 736 P.2d 379, 382 (App. Div. 1 1987).

D. Exigency & Emergency

Exigent circumstances are defined as "a response to an emergency, a 'hot' pursuit, the probability of the destruction of evidence, the possibility of violence, the knowledge that a suspect is fleeing or attempting to flee, or a substantial risk of harm to the persons involved or to the law-enforcement process if officers must wait for a warrant." *State v. Soto*, 195 Ariz. 429, 431, 990 P.2d 23, 25 (App. Div. 1 1999), citing *Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *State v. Gissendaner,*177 Ariz. 81, 865 P.2d 125 (App. Div. 1 1993). Warrantless searches are permitted under exigent circumstances. The scope of such searches is strictly limited by the exigency.

1. Emergency Circumstances

a. Knock and Announce

Emergencies are normally confined to those circumstances where an officer believes that a person's life or safety may be in jeopardy. Knock and announce requirements are usually inapplicable. *State v. Fisher,* 141 Ariz. 227, 237, 686 P.2d 750, 760 (1984)(includes good discussion of differences between emergency aid doctrine and exigent circumstances doctrine.); *State v. Mata,* 125 Ariz. 233, 239, 609 P.2d 48, 54 (1980); *State v. Linton,* 146 Ariz. 184, 185, 704 P.2d 825, 826 (App. Div. 2 1985) (another good discussion, officers did not have to honor refusal of entry by bloody fighters); *State v. Wright,* 125 Ariz. 36, 607 P.2d 19 (App. Div. 2 1979).

b. Can Check Despite Assurances

An officer need not accept the word of anyone that everyone is all right but may search for himself to make sure. *State v. Linton,* 146 Ariz. 184, 704 P.2d 825 (App. Div. 2 1985); *State v. Sainz,* 18 Ariz.App. 358, 360, 501 P.2d 1199, 1201 (App. Div. 2 1972) (call said woman being attacked with knife).

c. Good Language

See *Wayne v. U.S.*, 318 F.2d 205 (2nd Cir. 1963) for good language by Burger when he was sitting on the Court of Appeals.

d. Burning Buildings

A burning building justifies warrantless entry, but a warrant will be required to search for criminal activity. *Michigan v. Clifford*, 464 U.S. 287, 292, 104 S.Ct. 641, 646 (1984); Mazen v. Seidel, 189 Ariz. 195, 197-98, 940 P.2d 923, 925-26 (1997).

e Welfare Checks

Although they are probably not even searches, welfare checks are included here as conceptually related to emergency circumstances. Welfare checks are situations where for some reason other citizens believe something may have happened to a person, and ask police to check on the welfare of that person. Conceptually, police are not looking for evidence and their intrusion is not a search.

Stop of stranded motorist is a valid exercise of the community caretaking function. *State v. Organ*, --- P.3d ----, ¶ 16, 2010 WL 2406871 (App. Div. 1 2010).

Police responded to check welfare call at motel room after someone heard screams inside but delayed entry for almost 40 minutes after obtaining the master key. Delay alone does not bar use of emergency circumstances exception. State v. Sharp, 193 Ariz. 414, 419, 973 P.2d 1171, 1176 (1999).

Officer responding to call that the juvenile might commit suicide could not search her purse for weapons after seizing it. Once he had taken the purse away from her, there was no reasonable belief that she could use anything in their to harm herself. *In re Tiffany O.*, 217 Ariz. 370, 373, 174 P.3d 282, 285 (App. Div. 1 2008).

2. Hot Pursuit

When officers are in "hot pursuit" of a fleeing felon they may follow the suspect into the home and search without warrant.

a. U.S. Supreme Court Analysis

1) When is a search permitted under the hot pursuit doctrine?

In the landmark case of *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967), an armed robber held up a cab company. Cab drivers by radio communication followed the robber to his home. Within minutes, officers arrived at the house, knocked and were admitted by the robber's mother. The Supreme Court justified the ensuing warrantless search because the officers were in "hot pursuit".

2) What is the scope of the search? Under the

circumstances of this case "the exigencies of the situation made that course imperative.

> The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others ... The permissible scope of search must, therefore, at the least, be as broad as may be reasonably necessary to prevent the dangers that the suspect at large in the house may resist or escape.

Warden v. Hayden, 387 U.S. 294, 298-99, 87 S.Ct. 1642, 1646 (1967).

3) Hot Misdemeanor Pursuit

The hot pursuit doctrine does not extend to waking an already asleep homeowner, from his own bed, in order to take him to the station to secure blood alcohol evidence of a minor, non-jailable offense. *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 2098 (1984).

b. Arizona Supreme Court Analysis

The issue of hot pursuit has been rarely litigated in Arizona. The Arizona Supreme Court held that a

warrantless entry into a dwelling to effect an arrest is per se unreasonable unless exigent circumstances, such as the pursuit of a fleeing felon, require the police to act before a warrant can be obtained. *State v. Love*, 123 Ariz. 157, 159, 598 P.2d 976, 978 (1979). However, in the much-criticized case of *State v. Cook*, 115 Ariz. 189, 193, 564 P.2d 877 (1977) disapproved on other grounds in *State v. Smith*, 123 Ariz. 231, 599 P.2d 187 (1979), the court attempted to set out some criteria in justifying a hot pursuit instruction:

1) Did the officers witness the crime?
2) Was the suspect armed?
3) How "fresh" was the flight?
4) How substantial was the witness's information as to the suspect's whereabouts?
5) Could the premises have been easily secured and a warrant obtained?

In two cases of clear "red hot" pursuit, the Supreme Court ruled that it was proper for officers to enter the defendant's home without knocking or announcing when the defendants had literally slammed the door in the officer's faces. *State v. Love*, 123 Ariz. 157, 598 P.2d 976 (1979); *State v. Davis*, 119 Ariz. 529, 582 P.2d 175 (1978).

One caution, without exigent probable circumstances, the entrance of police through an open doorway violates the "knock and announce" statute, A.R.S. § 13-3926(B). *State v. LaPonsie*, 136 Ariz. 73, 74, 664 P.2d 223, 224 (App. Div. 2 1982).

3. Protective Sweep

A protective sweep is a brief check by officers of premises for armed and dangerous individuals who might pose a danger to officers in the course of their lawful duties.

a. Justification

The basis for the legitimacy of these searches is found in the dictum of *Warden v. Hayden*, 387 U.S. 294, 298-99, 87 S.Ct. 1642, 1646 (1967).

b. Intrusion and Scope

Officers stopped a car on the highway between Nogales and Tucson. Thirty-one bricks of marijuana were discovered and the driver was permitted to deliver the load to its destination in Tucson. After arrival, the officers decided to secure the premises because the residents "were known to possibly have automatic weapons and it was getting dark." After securing the residence a warrant was obtained. *State v. Warren*, 121 Ariz. 306, 310, 589 P.2d 1338, 1342 (App. Div. 2 1978).

A witness memorized the license plate of an armed robber. Later officers went to a trailer park where the vehicle was parked. Both by reputation and personal knowledge, officers were aware that a "criminally-inclined element of the population resided" in the park. Officers asked two men who the car belonged to. One of them said he would go into the trailer and get the robber. The officer went with him and found the robber. The other man was disarmed. Soon afterward, two officers went back into the trailer to check a bedroom for other occupants and saw and seized crime related property in plain view. An officer seized the property and got a telephonic search warrant. Under these circumstances, "[a] cursory search for possible occupants of the trailer who could have posed a danger to the law enforcement officers (was) justifiable." *State v. Mead*, 120 Ariz. 108, 584 P.2d 572 (1978).

Officers were told that people were being robbed and tied up in a residence. Officers went to the residence and told everyone to come out. After that officers protectively swept the residence and found heroin in plain view, which was used to convict one of those whose hands were tied. The issue was whether the

officers had reason to believe others might have remained hidden in the house. The court concluded that the officers did not know how many men were inside the house. *State v. McCleary*, 116 Ariz. 244, 568 P.2d 1142 (App. Div. 2 1977). See also *State v. Sardo*, 112 Ariz. 509, 543 P.2d 1138 (1975); *State v. Stauffer*, 112 Ariz. 26, 536 P.2d 1044 (1975).

c. Search Warrant Allows Detention of Occupants But Not Visitors

The United States Supreme Court held a search warrant gave limited authority to detain the occupants while the search warrant is served. In *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587 (1981), the court allowed police officers to detain the owner of the premises outside and make him accompany them inside, while the warrant was served.

On the other hand, mere visitors may not be detained for two hours without reasonable grounds. *State v. Carrasco*, 147 Ariz. 558, 561, 711 P.2d 1231, 1234 (App. Div. 1 1985). Evidence was suppressed where police had no articulable reason to detain defendant for two hours until a drug sniffing dog arrived.

4. Probability of the Destruction or Removal of Crime-Related Evidence

a. Premises Impoundment

A warrantless entry into premises is justified when there is a probability of imminent destruction of or the removal of crime-related property. See *Vale v. Lousiana*, 399 U.S. 30, 35, 90 S.Ct. 1969, 1972 (1970); *State v. Decker*, 119 Ariz. 195, 198, 580 P.2d 333, 336 (1978) (smell of burning marijuana).

Officers should be very sure of the exigency of the situation before impounding the premises. The Arizona Supreme Court does not like the picture of police bursting warrantless into a house, herding women and children into a room at gunpoint, then holding them incommunicado for hours until the warrant arrives. The court has intimated they may invoke the Arizona Constitution. *State v. Bolt*, 142 Ariz. 260, 265, 689 P.2d 519,524 (1984); *State v. Martin*, 139 Ariz. 466, 679 P.2d 489 (1984). The court said increasingly urgent calls to a pager of an arrested dealer did not constitute exigent circumstances.

b. Scope of the Search

The scope of the search is normally limited to those intrusions necessary to secure or impound premises. *State v. Broadfoot*, 115 Ariz. 537, 539, 566 P.2d 685, 687 (1977).

Crime-related evidence, discovered in the course of the impoundment, may be seized under the plain view doctrine. See *State v. Sardo*, 112 Ariz. 509, 543 P.2d 1138 (1975) (safest to get a warrant based on pre-impoundment probable cause). *See generally State v. Stein*, 153 Ariz. 235, 735 P.2d 845 (App. Div. 1 1987).

5. The Vehicle Exception

The automobile exception to the search warrant requirement has been settled in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157 (1982). In *Ross*, the United States Supreme Court held that if an officer has probable cause to believe a vehicle contains contraband, the officer can search the vehicle and containers therein as thoroughly as if he had a warrant. The United States Supreme Court has allowed officers to enter the properly stopped car, in order to remove papers obscuring the VIN number. *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960 (1986).

In addition, Arizona follows the federal rule and allows police officers to open doors and hoods to check vehicle identification numbers if the officer is in a place where he has a right to be. *State v. Renfrow*, 123

Ariz. 64, 597 P.2d 546 (App. Div. 1 1979); *State v. Ray*, 123 Ariz. 175, 598 P.2d 994 (App. Div. 1 1978), approved in pertinent part 123 Ariz. 171, 598 P.2d 990 (1979).

a. Delay in Searching the Vehicle

The station house search of the vehicle from which accused robbers were arrested was proper because "[t]he probable cause factor still obtain(s) at the station house." *Chambers v. Maroney*, 399 U.S. 42, 47, 90 S.Ct. 1975, 1979 (1970); *Texas v. White*, 423 U.S. 67, 96 S.Ct. 3092 (1976); *State v. White*, 118 Ariz. 47, 574 P.2d 840 (App. Div. 1 1977). *See generally Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091 (1984).

b.Retroactivity

Arizona applies *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983) and *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157 (1982), retroactively when testing the validity of probable cause. *State v. Espinosa-Gamez*, 139 Ariz. 415, 417, 678 P.2d 1379, 1381 (1984).

c. Arizona Cases

Information obtained legally after an investigatory stop can develop the necessary probable cause to search a vehicle. *State v. Dixon*, 127 Ariz. 554, 562, 622 P.2d 501, 509 (App. Div. 2 1981); *State v. Eason*, 124 Ariz. 390, 604 P.2d 654 (App. Div. 1 1979).

The mobile character of the car plus the smell of marijuana gave officers exigent circumstances to search it. State v. Reyna, 205 Ariz. 374, 71 P.3d 366 (App. Div. 1 2003); *State v. Chavez-Inzunza*, 145 Ariz. 362, 364, 701 P.2d 858, 860 (App. Div. 2 1985); *State v. Olson*, 134 Ariz. 114, 654 P.2d 48 (App. Div. 1 1982); *State v. Hernandez*, 112 Ariz. 246, 540 P.2d 1227 (1975) (car involved in narcotics smuggling). *In Re 1977 Cessna 206, Nunez v. State*, 142 Ariz. 196, 198, 688 P.2d 1088, 1090 (App. Div. 1 1984) (airplane). *State v. White*, 118 Ariz. 47, 574 P.2d 840 (App. Div. 1 1977) (airplane). *But see State v. Dean*, 206 Ariz. 158, 76 P.3d 429 (2003) (no probable cause to search car parked in defendant's driveway when he fled from police into the house).

Driver's intoxicated condition gave probable cause to believe the vehicle contained the cause of the intoxication. *State v. Hersch*, 135 Ariz 528, 531, 662 P.2d 1035, 1038 (App. Div. 2 1982).

Officers can conduct checks of license plates without reasonable suspicion. *State v. Harding*, 137 Ariz. 278, 287, 670 P.2d 383, 392 (1983). However, a driver's failure to produce vehicle registration alone does not provide probable cause to believe the car is stolen and justify search of vehicle. *State v. Branham*, 191 Ariz. 94, 952 P.2d 332 (App. Div. 1 1997). The failure to produce license or registration along with another suspicious factor will provide probable cause to search. *State v. Joliff*, 111 Ariz. 376, 530 P.2d 1105 (1975).

Passenger calling the defendant driver by a different name than the one he signed on the traffic citation gave the officer probable cause to search the car to investigate possible forgery. *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. Div. 1 1989).

Police had probable cause to search car for evidence of jewelry store robbery after investigatory stop where officer observed jewelry boxes and jewelry on defendant. *State v. Eliason*, 25 Ariz. App. 523, 544 P.2d 1124 (App. Div. 1 1976).

Defendant attempts to flee provide probable cause to search car. *State v. Puiq*, 112 Ariz. 519, 544 P.2d 201 (1975); *State v. Jackson*, 112 Ariz. 149, 539 P.2d 906 (1975); *State v. Arellano*, 110 Ariz. 434, 529 P.2d 306 (1974). *State v. Sumter*, 24 Ariz.App. 131, 536 P.2d 252 (App. Div. 1 1975) (defendant driving evasively).

State v. Million, 120 Ariz. 10, 583 P.2d 897 (1978) (motor home); *State v. Sardo*, 112 Ariz. 509, 543 P.2d 1138 (1975) (mobile home involved in smuggling narcotics).

See also State v. Goldberg, 112 Ariz. 202, 540 P.2d 674 (1975) (defendant riding motorcycle on restricted federal lands).

E. Voluntary Consent

A warrantless search may be conducted in areas protected by the Fourth Amendment if voluntary consent is obtained from someone with the power to give it. By voluntarily consenting to the search, a person is merely waiving his Fourth Amendment Rights.

Whether the suspect voluntarily consented to the search is determined by considering the totality of the circumstances. *State v. Caraveo*, 222 Ariz. 228, 213 P.3d 377 (App. Div. 1 2009).

1. Voluntariness of Consent

a. Burden of Proof

Several Arizona cases have stated that the burden of proof is "clear and positive" evidence. *State v. Jones*, 185 Ariz. 471, 480-81, 917 P.2d 200,209-10 (1996); *State v. McMahon*, 116 Ariz. 129, 568 P.2d 1027 (1977); *State v. Wilkerson*, 117 Ariz. 143, 571 P.2d 289 (App. Div. 2 1977). However, Rule 16.2b provides that the prosecutor's burden in proving voluntary consent is by a "preponderance of the evidence."

b. Waiver Must be Clear and Unequivocal

In order for consent to be voluntary, clear and positive evidence in unequivocal words or conduct expressing consent must be shown. *State v. Lynch*, 120 Ariz. 584, 586, 587 P.2d 770 (App. Div. 2 1978). In *Lynch*, this test was satisfied when a suspect in custody was asked where his license was and he replied that it was in his shirt pocket behind the driver's seat. While retrieving the license the officer smelled marijuana which was in the bag next to the shirt.

c. Waiver may be Expressed by Words or Conduct

Although consent must be unequivocal it may be proven by conduct. *State v, Tucker*, 118 Ariz. 76, 574 P.2d 1295 (1978); *State v. Lynch*, 120 Ariz. 584, 586, 587 P.2d 770 (App. Div. 2 1978); *State v. Steele*, 23 Ariz.App. 73, 530 P.2d 919 (App. Div. 2 1978).

In *Tucker*, the Supreme Court, over strong dissent from Justice Gordon, found consent by conduct because the defendant had reported that he was a victim of a crime and had shown an officer around the premises. The Court said, concerning a search conducted thirty to sixty minutes later, "No protest was made by the appellant. Consent is plain on the face of the undisputed facts." 118 Ariz. at 79, 574 P.2d at 1298.

In *Steele*, the officers asked the appellant to follow them into the house. "Her doing so gave them permission to enter...." 23 Ariz.App. at 75, 530 P.2d at 921.

536 P.2d 252 (Ariz. 1975)
211, 531 P.2d 1149

In *State v. Canez*, 202 Ariz. 133, 151, 42 P.3d 564, 582 (2002), the officer testified that when he talked to the defendant's wife, he said "something about coming in, she turned and walked back into the house, and [he] followed her in." The court found this was not unequivocal consent.

d. Factors in the Determination of Voluntariness

"Voluntariness is question of fact to be determined from all the circumstances." *Schneckloth v. Bustamonte,* 412 U.S 218, 248, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854, 875 (1974).

To determine whether police misconduct tainted a suspect's subsequent consent to search, the court must consider (1) the time elapsed between the illegal conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the misconduct. *State v. Guillen*, 223 Ariz. 314, 223 P.3d 658 (2010).

Circumstances or factors which Arizona Courts have considered are:

1)Was the suspect in custody?

Although Arizona Courts have given lip service to the importance of this factor, seldom have they ruled that a suspect in custody did not voluntarily consent.

State v. Kansner, 97 Ariz. 233, 399 P.2d 426 (1965).

State v. Laughter, 128 Ariz. 264, 625 P.2d 327 (App. Div. 1 1980).

State v. Lynch, 120 Ariz. 584, 587 P.2d 770 (App. Div. 2 1978).

State v. Knaubert, 27 Ariz.App. 53, 550 P.2d 1097 (App. Div. 1 1976).

2) Did the suspect deny guilt?

A suspect who does not deny guilt or, better yet, confesses is more likely to give voluntary consent.

State v. Sherrick, 98 Ariz. 46, 402 P.2d 1 (1965) (confessed).

State v. Smith, 123 Ariz. 231, 599 P.2d 187 (1979) (suspect denied guilt, consent voluntary).

State v. Wilkerson, 117 Ariz. 143, 571 P.2d 289 (App. Div. 2 1977) (did not deny guilt).

State v. Ballesteros, 23 Ariz.App. 211, 531 P.2d 1149 (App. Div. 2 1975) (did not deny guilt).

3) Did the suspect initially refuse consent to search?

Presumably, once a suspect has asserted his Fourth Amendment rights, it is unlikely, absent special circumstances, that he would later waive them. *See State v. Sherrick,* 98 Ariz. 46, 402 P.2d 1 (1965).

State v. Henry, 128 Ariz. 204, 624 P.2d 882 (App. Div. 2 1980) (argument was not refusal to allow airline search).

State v. Wilkerson, 117 Ariz. 143, 571 P.2d 289 (App. Div. 2 1977) (did not initially refuse).

State v. Ballesteros, 23 Ariz.App. 211, 531 P.2d 1149 (App. Div. 2 1975) (did not initially refuse).

4) Did the suspect know that the crime-related evidence would be discovered in the search.

The courts often reason that a person would not voluntarily consent if he knew the officer would find the crime-related evidence. Notwithstanding this assumption, these cases are usually decided on the "bravado" theory. In *Wilkerson, supra,* for example, the court stated in finding consent voluntary, in spite of the fact that the search resulted in a seizure of contraband which appellant must have known would be discovered, the particular circumstances would indicate voluntariness rather than involuntariness in hope of bluffing his way through. 117 Ariz. at 145. *See also State v. Ballesteros,* 23 Ariz.App. 211, 531 P.2d 1149 (App. Div. 2 1975).

In one case, an alert officer asked the suspect after the seizure whether he had consented to the search to which the suspect replied, "Yeah, I let you search the car. Do you think I'd have let you search it, if I knew that stuff was in there?" *State v. Gossett,* 120 Ariz. 44, 46, 583 P.2d 1364, 1366 (App. Div. 1 1978).

In *State v. Watson,* 114 Ariz. 1, 559 P.2d 121 (1976), a girlfriend of the suspect permitted officers to look around her apartment for the suspect because she knew they would find nothing. The officers did, however, find evidence in plain view after entry. In *State v. Smith,* 123 Ariz. 231, 599 P.2d 187 (1979), the defendant said police "would not find any evidence." Defendant was intelligent and this statement showed he knew the results of the search could be used against him.

5) Warnings

It is clear in Arizona that a person need not be "warned" that he can refuse consent to search. *State v. Allen,* 111 Ariz. 546, 535 P.2d 3 (1975). *State v. Jensen,* 111 Ariz. 408, 531 P.2d 531 (1975); *United States v. Ritter,* 752 F.2d 435 (9th Cir. 1985) (*Miranda* unnecessary before valid consent). Such warnings, however, strengthen the state's contentions of voluntariness *State v. Knaubert,* 27 Ariz.App. 53, 550 P.2d 1095 (App. Div. 1 1976) *See also State v. Lambert,* 110 Ariz. 460, 520 P.2d 508 (1974) (where court states consent given after *Miranda* warnings).

6)Aiding Officers

A factor in showing the voluntariness of consent is the suspect's aiding or affirmative conduct in helping the officers find the crime related property. *State v. Sherrick,* 98 Ariz. 46, 402 P.2d 1 (1965); *State v. Guerro,* 119 Ariz. 273, 580 P.2d 734 (App. Div. 2 1978) (opened trunk without request); *State v. Kranbert,* 27 Ariz.App. 53, 550 P.2d 1095 (App. Div. 1 1976).

7) Probable Cause to get a Search Warrant

Where there are ample grounds to obtain a search warrant to search, it is harmless error that the defendant was not told he could refuse to consent to a search of his vehicle. *State v. Allen,* 111 Ariz. 546, 549, 535 P.2d 3, 6 (1975).

8) Ruses

On the other hand, ruses are permissible as long as officers do not exceed the boundaries that would be true if the ruse were true. In *State v. Poland,* 132 Ariz. 269, 645 P.2d 784 (1982), police posed as home buyers to tour the defendant's home, then used the information so obtained in a search warrant. Ruses are necessary to undercover officers in narcotics cases and are routinely upheld. The nature of the crime may require deceit. *United States v. Taylor,* 716 F.2d 701 (9th Cir. 1983). (A ruse was permissible to get an armed defendant out of the house).

9) Signed Consent

A signed consent document is a strong indicator of voluntariness. *State v. Macumbe,* 112 Ariz. 569, 572, 544 P.2d 1084 (1976).

10)Threats and deceit

Threats and deceit may vitiate consent. *State v. McMahon,* 116 Ariz. 129, 568 P.2 d 1027 (1977) (defendant was told that if he didn't open the door, officers would kick it in; after entry, officer falsely stated that he had a search warrant); *State v. Peterson,* 124 Ariz. 336, 604 P.2d 267 (App. Div. 2 1979) (consent obtained by deceit after illegal arrest); *but see State v. Dugan,* 11 3 Ar i z. 3 54, 555 P.2d 108 (1976). Officers investigating a homicide said they wanted to search the defendant's car regarding an accident. The court approved this tactic.)

e. Implied Consent

In situations where a person has a low expectation of privacy, there may well be an affirmative duty on

the part of possesser to inform the intruder that consent to search is not present.

In *State v. Cobb*, 115 Ariz. 484, 486-87, 566 P.2d 285, 287-88 (1977), an officer testified that "he was on and off appellant's property several times, talking to him about the robbery ... At no time did appellant appear uncooperative or ask the officer to leave the premises. As officer Ford was leaving appellant's front porch on one of these occasions he saw a brooch lying in the appellant's driveway."
A person who wants to travel by commercial airplane impliedly consents to search but must be at least constructively aware of his ability to avoid the search by refusing to board the aircraft. *State v. Miller*, 110 Ariz. 491, 520 P.2d 115 (1974); *State v. Henry*, 128 Ariz. 204, 624 P.2d 882 (App. Div. 2 1980).

Suspect's mother agreed to go with officers to her apartment to look for suspect's shoes. Upon arrival, officers followed suspect's mother into the apartment. The mother testified that although she never asked the officers to enter, "she did not have any objections of them [sic] coming." The Court of Appeals concluded:

> We think such evidence fully supports a conclusion of express or implied consent by the mother to the search of her apartment for the tennis shoes.

State v. Clemons, 27 Ariz.App. 193, 194, 552 P.2d 1208, 1209 (App. Div. 1 1976).

The 9th Circuit found the search reasonable, although consent arguably involuntary, when metal detectors were used at entry to courthouse. *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978).

f. Limited Consent

Consent to search may be limited to certain areas. Where evidence is obtained from search beyond the scope of such consent, the evidence will be suppressed. *State v. Cobb*, 115 Ariz. 484, 566 P.2d 285 (1977). *See also State v. Lynch*, 120 Ariz. 584, 587 P.2d 770 (App. Div. 2 1978). Whether a consentual search remained within the limits is determined by a totality of the circumstances. *State v. Swanson*, 172 Ariz. 579, 838 P.2d 1340 (App. Div. 1 1992).

In *Cobb*, an officer was permitted to look only from the doorway. When the officer saw a jacket matching that of the perpetrator, he walked into the house and matched a button left at the scene with the buttons on the jacket. The jacket and the button were suppressed. *Cobb, supra*.

In Swanson, the defendant consented to a search of his car after the officer asked whether he had any guns, drugs or large sums of money therein. The court found the opening of door panels was inherently invasive and beyond the scope of the defendant's reasonable consent. *Swanson, supra*, at 583, 838 P.2d at 1344.

g.Parolees and Probationers

By accepting probation or parole, parolees and probationers may give consent in the terms of release. *State v. Robeldo*, 116 Ariz. 346, 569 P.2d 288 (App. Div. 1 1977); *State v. Montgomery*, 115 Ariz. 583, 566 P.2d 1329 (1977). *State v. Webb*, 149 Ariz. 158, 717 P.2 462 (App. Div. 2 1985) (okay for different parole officer to conduct search when defendant's parole officer unavailable); *State v. Turner*, 142 Ariz. 138, 688 P.2d 1030 (App. Div. 2 1984). *State v. Hill*, 136 Ariz. 347, 666 P.2d 92 (App. Div. 2 1983) (probation officer search may not be used as a pretext for cops to conduct a criminal investigation); *State v. Turner*, 142 Ariz. 138, 688 P.2d 1030 (App. Div. 2 1984) (the presence and assistance of the police did not invalidate the probation officer's right to search the defendant's luggage).

The United States Supreme Court has upheld the constitutionality of state regulations requiring probationers to consent to searches based on "reasonable grounds." *Griffith v. Wisconsin*, 483 U.S. 868, 879, 107 S.Ct. 3164, 3171 (1987). While Arizona has no such regulation, Arizona case law should

be all right. *Griffith* upheld the consent to search clause as a requirement, not a consent.

h. Counsel and Consent

Once a defendant has invoked his right to counsel, his consent to search will be involuntary unless he has been provided counsel, or has initiated questioning. *State v. King*, 140 Ariz. 602, 684 P.2d 174 (App. Div. 2 1984). In light of *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985) consent to search should be obtained prior to arraignment, or to initial appearance, if counsel is appointed at initial appearance.

2. Third Party Consent

Voluntary consent by a person to search private areas belonging to another is valid if the third person "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993 (1974).

In *Matlock*, the Supreme Court clarified its holding with this statement in a footnote:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements * * * but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171, n. 7 (internal citations omitted).

If a person reasonably appears to have authority to consent to a search, police officers may rely on that authority. The courts will not examine whether the person had actual authority to consent to the search. *State v. Castenada*, 150 Ariz. 382, 398, 724 P.2d 1, 8 (1986); *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983) cert. denied 104 S.Ct. 3519. *State v. McGann*, 132 Ariz. 296, 645 P.2d 837 (1982).

Officers should be careful and obtain clear consent. When an owner called officers to the scene of a homicide, the Court of Appeals held the owner did not consent to a search of the bar merely by summoning officers. *State v. Young*, 135 Ariz. 437, 661 P.2d 1138 (App. Div. 1 1982).

a. Parents for Children

Normally a parent may consent to search of areas where his child has a reasonable expectation of privacy if the child has not "staked" an area out as his own. In *Moreno*, the child was not considered a tenant in his parent's home where he was given one room for his own use, never excluded anyone from his room, and did not lock his room from the outside. *State v. Moreno*, 27 Ariz.App. 460, 556 P.2d 14 (App. Div. 1 1976).

Defendant lived in a small apartment detached from the main house on the property but did not pay rent. The court held that his parents gave valid consent to search even though the defendant kept the room locked, because his parents had a key and entered at will. *State v. Maximo*, 170 Ariz. 94, 97-98, 821 P.2d 1379, 1382-83 (App. Div. 2 1999).

Parents may consent to a search even when the child has declined consent. *State v. Clemons*, 27 Ariz.App. 193, 194, 552 P.2d 1208, 1209 (App. Div. 1 1976) (parents felt they could enter the minor's closed, but unlocked, bedroom any time).

Parents may also consent for adult children in certain circumstances. *See generally State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983) cert. denied 104 S.Ct. 3519 (mother said she was joint owner of the property).

b. Children for Other Family Members

Children may consent to the search of areas which are under the child's common control. *State v. Patricella*, 109 Ariz. 393, 294, 510 P.2d 39 (1973) (stepdaughter gave officers combination to lock on the shed door).

For purposes of a motion to suppress statements made by the defendant, the court found that the defendant's 15 year old brother gave officers valid consent to enter the house and follow him to the defendant's bedroom, where, when asked about the crime, he confessed. *State v. Ayala*, 178 Ariz. 318, 873 P.2d 656 (App. Div. 2 1993).

c. Spouse for Spouse

A spouse may give consent to search any property over which he/she exercises control and dominion. *Yuma County Attorney v. McGuire*, 111 Ariz. 437, 532 P.2d 157 (1975). A wife could consent to a house search where she had common authority over the family house. *State v. Summerlin*, 138 Ariz. 426, 675 P.2d 686 (1983); *State v. Woratzeck*, 130 Ariz. 499, 637 P.2d 301 (App. Div. 2 1981) (common authority and suspect spouse not home).

d. Roommates and Other "Living Togethers"

Roommates and others who live together may consent to the search of areas where there is unrestricted accessibility. *State v. Walker*, 215 Ariz. 91, 96, 158 P.3d 220, 225 (App. Div. 1 2007); *United States v. Wilson*, 447 F.2d 1, 5 (9th Cir. 1971) *See State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981); *State v. Bailes*, 118 Ariz. 582, 578 P.2d 1011 (App. Div. 2 1978).

Unrestricted accessibility covers common rooms, such as a dining room closet. *State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996).

e. Host for Guest

A host(ess) may not permit the search of the guest's room if during the time of the stay, the guest exercises complete authority over the room. *State v. Tucker*, 118 Ariz. 76, 574 P.2d 1295 (1978) (slept and stored property in his room - no joint access or control).

f. Hotel for Guests

A hotel proprietor does not have joint possession of a guest's room for the purpose of giving consent to search. *Stoner v. California*, 376 U.S. 483, 487-88, 84 S.Ct. 889, 892 (1964). However, when a tenant has been lawfully evicted for failure to pay rent, the hotel manager may consent to the search of the ex-guest's room, *State v. Ahumada*, 125 Ariz. 316, 609 P.2d 586 (App. Div. 2 1980); *State v. Carrillo*, 26 Ariz.App. 113, 546 P.2d 838 (App. Div. 2 1976).

However, defendant could not suppress cocaine found by hotel manager in a purse that had been given to manager for safekeeping. *State v. Weiss*, 449 So.2d 915 (Fla.App. 1984).

g.Landlord for Tenants

A landlord (or mortgagee) may give consent to search after lawful repossession of the premises. *State v. Fassler,* 108 Ariz. 586, 593, 503 P.2d 807, 814 (1972).

h.Personal Property - Luggage

A person carrying luggage for another has no joint control or access which would allow the person to consent for the owner. *State v. Heberly,* 120 Ariz. 541, 587 P.2d 260 (App. Div. 1 1978).

i.Employees, Employers and Co-Owners

An employee who possesses control over premises or effects (corporate papers) may consent to a search thereof. *State v. Brewer,* 26 Ariz.App. 408, 549 P.2d 188 (App. Div. 1 1976). Likewise, employers who control premises may consent to a search thereof. *See generally State v. Renfrow,* 123 Ariz. 64, 597 P.2d 546 (App. Div. 1 1979). *See generally State v. McGann,* 132 Ariz. 296, 645 P.2d 837 (1982) (employee gave car keys to employer, who searched car and found evidence of credit card fraud).

Defendant's sister gave valid consent to search defendant's business premises where she claimed she was part owner of the business and officers saw her name on a business license on the wall. *State v. Casteneda,* 150 Ariz. 382, 389, 724 P.2d 1, 9 (1986).

j.Common Carriers

Common carriers may, if there is reasonable cause to believe a parcel contains contraband, consent to an officer's opening of the parcel. *State v. Pacheco,* 121 Ariz. 88, 588 P.2d 830 (1979); *State v. Fassler,* 108 Ariz. 586, 503 P.2d 807 (1972); *State v. Best,* 146 Ariz. 1, 703 P.2d 548 (App. Div. 2 1985). *In Re1966 Volkswagon Bus,* 120 Ariz. 365, 586 P.2d 210 (App. Div. 2 1978).

k.Property Given Third Parties

A defendant who entrusts his property to a third party runs the risk that the third party will consent to the search. *State v. Schad,* 129 Ariz. 557, 633 P.2d 366 (1981).

Driver of a vehicle can give valid consent to search the vehicle where the passenger is the owner of the car. *State v. Flores,* 195 Ariz. 199, 986 P.2d 232 (App. Div. 1 1999). On the other hand, the owner of the vehicle cannot give consent to search a zippered case belonging to the driver of the car. *State v. Bentlage,* 192 Ariz. 117, 961 P.2d 1065 (App. Div. 2 1998).

l. Guest for Guest

A defendant who is a guest lacked standing to contest the officer's entry after another guest consented to their entry. *State v. Johnson,* 132 Ariz. 5, 643 P.2d 708 (App. Div. 1 1985).

3. Issues on Appeal

Evidence is viewed on appeal in a light favorable to support of the ruling below. *State v. Ballesteros,* 23 Ariz.App. 211, 214, 531 P.2d 1149, 1152 (App. Div. 2 1975). *State v. Wilkerson,* 117 Ariz. 143, 571 P.2d 289 (App. Div. 2 1977).

4. Voluntary Consent may "Dissipate" Taint of Illegal Stop

Defendant voluntarily opened the trunk of a vehicle illegally stopped by police. Because he gave valid consent to the search, the items seized as a result were not fruit of the poisonous tree due to "an intervening act of free will on his part." *State v. Fortier,* 113 Ariz. 332, 335-36, 553 P.2d 1206, 1209-10 (1976),

disapproved on other grounds *State v. Jarzab*, 123 Ariz. 308, 599 P.2d 761 (1979).

F. Miscellaneous Warantless Searches

In certain situations, the courts have cut out an exception to the warrant requirement. Usually in such circumstances, the court just states that the search was reasonable.

1. Airport

Although airport searches and seizures appear to circumvent Fourth Amendment safeguards in the name of expediency, it is apparent upon reflection that almost all such warrantless searches and seizures can be justified under traditional theories. *See People v. Brett*, 460 N.E.2d 876 (Ill.App. 1984); *United States v. West*, 731 F.2d 90 (1st Cir. 1984).

a. Exigency (hijacking) and Implicit Consent

The danger of hijacking was important in the implementation of the magnetometer and search of all carry-on luggage.

The reasonableness of this search was, however, bolstered by a potential passenger's implicit consent to the search in that he could avoid the search by choosing an alternative mode of travel. *See McSweeney v. State*, 358 S.E.2d 465 (Ga.App. 1987), which held once defendant consents to a search by trying to enter a secure area, that consent can't be withdrawn withdrawn.

b."Profile" - Reasonable Suspicion

Both federal and Arizona courts have recognized the legitimacy of "profile" search and seizure.

Such searches and seizures to be justifiable must reflect that:

1)Profile factors show reasonable cause to believe person exhibiting characteristics is carrying controlled substances.

2)Suspect matches profile.

See *State v. Ochoa*, 112 Ariz. 582, 585, 544 P.2d 1097, 1100 (1976). *See generally United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870 (1980) (2 say no stop, 3 say stop was justified by profile); *but see State v. Graciano*, 134 Ariz. 35, 653 P.2d 683 (1982).

c. Limited Expectation of Privacy

Airline passengers have a more limited expectation of privacy in checked luggage or other items of personal property that are consigned to the "common baggage area" of an airplane or airport than they would if they were carrying their personal property with them. *State v. Millan*, 185 Ariz. 398, 401-402, 916 P.2d 1114, 1117-18 (App. Div. 1 1995).

2. Border Searches

A person is subject to search (or seizure) at an international border, its "functional equivalent," or permanent checkpoint, without warrant, probable cause, or consent. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535 (1973); *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585 (1975).

a. The International Border and its "functional equivalent".

(1) Federal Courts' Analysis

The Ninth Circuit has narrowly construed the "functional equivalency" concept to encompass only those locations where "virtually everyone searched has just come from the other side of the border." *United States v. Guzman-Padilla,* 573 F.3d 865, 877 (9th Cir. 2009).

(2) Arizona Courts' Analysis

The Arizona Supreme Court discussed briefly the issue of functional equivalency in *State v. Sardo,* 112 Ariz. 509, 543 P.2d 1138 (1975). In that case, a "load" car was followed from the border to Yuma. In Yuma, the marijuana was transferred to a mobile home. The court, in finding that the mobile home could not be searched under the border exception, stated"

> [W]e can find no Arizona or federal case in which the search was considered a valid border search if the site was removed both in time and place from the border, and, in addition, neither the vehicle nor the person involved had actually crossed the border.

112 Ariz. at 513, 543 P.2d at 1142.

Within a year of the *Sardo* ruling, the Court of Appeals found that a car traveling on a sandy drag strip not more than 100 yards from the official border crossing could be stopped and searched under the "functional equivalent" exception. *State v. Castro,* 27 Ariz.App. 323, 554 P.2d 919 (App. Div. 1 1976).

b.Extended Border Stops

Extended border stops are closely akin to the functional equivalent exception. *Alexander v. United States,* 362 F.2d 379 (9th Cir. 1966), cert. denied 385 U.S. 977; *State v. Smith,* 121 Ariz. 345, 590 P.2d 461 (App. Div. 2 1978).

Extended border searches "occur after the actual entry has been effected and intrude more on an individual's normal expectation of privacy." Consequently, they "must be justified by reasonable suspicion that the subject of the search was involved in criminal activity." *United States v. Guzman-Padilla,* 573 F.3d 865, 877-78 (9th Cir. 2009).

In *Smith, supra,* the defendant was observed crossing and recrossing the border on foot from Mexico, he was under constant surveillance until he was stopped two miles from the border. The defendant was returned to the border and strip-searched. The court upheld the admission of heroin found in the defendant's rectum under the extended border stop exception.

c.Permanent Checkpoints

Permanent checkpoints may be set up at locations away from the border. *United States v. Ortiz,* 422 U.S. 891, 95 S.Ct. 2585 (1975).

Permanent checkpoints should:

a) give notice to public well in advance of reaching the checkpoint;

b) be visibly manned by law enforcement officers;

c) always be in the same location. *State v. Guerrero,* 119 Ariz. 273, 275-76, 580 P.2d 734, 736-37 (App. Div. 2 1978). In *Guerrero,* the

Court of Appeals upheld a stop under the permanent checkpoint exception where there was no permanent structure. The checkpoint consisted only of a vehicle, orange cones and four signs. The court upheld the stop based on the factors listed above. In addition, the court cited with approval the fact that the checkpoint operated under a standardized procedure.

d. Other Locations Near the Border

1) Reasonable suspicion

If the location of the stop cannot be characterized as a functional equivalent or extension of the border an officer, in order to stop it, officers must have a reasonable suspicion that the car contains aliens. *Almeida-Sanchez v. United States,* 413 U.S. 266, 93 S.Ct. 2535 (1973).

2) Factors in determining reasonable suspicion

Mexican ancestry or Hispanic appearance alone will not constitute reasonable suspicion to stop a vehicle. *United States v. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574 (1975). Other factors that may lead to lawful immigration stops include: 1) the characteristics of the area, 2) proximity to the border, 3) usual patterns of traffic, 4) previous experience with alien traffic, 5) dress or hair style are associated with people currently living in Mexico. Additionally, the driver's behavior may be considered if the driving is erratic or the driver exhibits an "obvious attempt to evade officers" or it carries a heavy load. *State v. Gonzalez-Gutierrez,* 187 Ariz. 116, 120, 927 P.2d 776, 780 (1996), citing *Brignoni-Ponce,* 422 U.S. at 885, 95 S.Ct. at 2582.

The courts have bent over backwards in finding reasonable suspicion for the stop.
State v. Martinez, 134 Ariz. 119, 654 P.2d 53 (App. Div. 1 1982) (port was closed; stop occurred at notorious smuggling area; car fit profile of the type that smuggles aliens).
United States v. Payne, 555 F.2d 475 (5th Cir. 1977) (out-of-county license plate; driving erratically; riding low despite heavy duty shock absorbers).
United States v. Lujon-Miranda, 535 F.2d 327 (5th Cir. 1976) (unfamiliar vehicle on local road near uncontrolled river crossing area).

In *State v. Becerra,* 111 Ariz. 538, 534 P.2d 743 (1975), an experienced border patrol officer stopped a car 30 miles from the border on an east-west highway at 7:30 a.m. The court found probable cause to search the trunk because the driver and passenger were Mexican, the car was low riding and the area was conducive for picking up aliens.

But see State v. Graciano, 134 Ariz. 35 , 653 P.2d 683 (1982) (apparent race and a hunch insufficient to justify a stop of a vehicle of a type often stolen). Moreover, police do not have reasonable suspension to stop a car 60 miles from the border when the vehicle fits a profile for carrying illegal aliens, the driver and passnger are Hispanics wearing western style clothes and avoided eye contact with police. *State v. Maldonado,* 164 Ariz. 471, 793 P.2d 1138 (App. Div. 2 1990).

e. Reasonable Suspicion and Consent

Even if officers lack probable cause for a stop, they may ask to talk to individuals about whom they are suspicious. *Florida v. Rodriguez,* 469 U.S. 1, 105 S.Ct. 308 (1984) (airport seizure).

f. Agricultural Inspection Stations

Agricultural inspection stations at Arizona borders may require vehicles to stop and be searched. Crime related property discovered during such stops and searches is admissible. *State v. Bailey,* 120 Ariz. 399,

586 P.2d 648 (App. Div. 2 1978).

However, random stops of vehicles carrying livestock and hides without reasonable suspension or probable cause are not permitted under the "closely related business exception" to the Fourth Amendment. *State v. Hone*, 177 Ariz. 213, 866 P.2d 881 (App. Div. 1 1993).

g Military Police

The military police conducted a permissible temporary checkpoint where they stopped all cars in search of illegal aliens on the military base. *United States v. Hernandez*, 739 F.2d 484 (9th Cir. 1984).

3. Common Carriers

See, infra.

4. Inventory

See, infra.

a. Intrusion

See, infra.

b. Scope of the search

Although some courts, e.g. Montana, limit the scope of inventory searches to plain view, Arizona and most other jurisdictions do not so restrict the search because the more valuable things a person owns may be hidden. *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738 (1987) (closed containers in backpack); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092 (1976) (in glove compartment); *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523 (1973) (suitcase in the trunk); United States v. Edwards, 577 F.2d 833 (5th Cir. 1978) (under loose carpeting); State v. Walker, 119 Ariz. 121, 579 P.2d 1091 (1978) (removed back seat to get to suitcase in trunk; opened unlocked suitcase); State v. Gowans, 109 Ariz. 521, 514 P.2d 442 (1973); *In Re One 1965 Econoline*, 109 Ariz. 433, 511 P.2d 168 (1973).

5. Probationers

A person may be required as a condition of his probation or parole, to submit to a search without warrant. *Griffith v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164 (upheld regulatory scheme [regulatory narrowing of search authority accomplished by case law in Arizona]).

State v. Robeldo, 116 Ariz. 346, 569 P.2d 288 (1977) (urine sample required even though condition inadvertently left out of second terms of probation).

State v. Jeffers, 116 Ariz. 192, 568 P.2d 1090 (1977) (notice must be given to probationer prior to search; condition is constitutional whether with or without probable cause).

State v. Montgomery, 115 Ariz. 583, 566 P.2d 1329 (1977) (condition is constitutional).

State v. Webb, 149 Ariz. 158, 717 P.2d 462 (App. Div. 2 1985) (parole).

State v. Hill, 136 Ariz. 347, 666 P.2d 92 (App. Div. 2 1983) (police may not use probation officer as a pretext for conducting a criminal investigation).

In addition, the Fourth Amendment does not apply to probation revocation proceedings or to evidence properly seized by foreign governments. *State v. Nieuwenhuis,* 146 Ariz. 477, 706 P.2d 1244 (App. Div. 2 1985).

6. Prisoners

Historically, courts held that the Fourth Amendment was simply inapplicable to jail and prison inmates. In *Ruffin v. Commonwealth,* 62 Va. 790, 796 (1871), the court stated that the prisoner was "for the time being the slave of the state." More recently, in *People v. Chandler,* 262 Cal.App.2d 350, 356, 68 Cal.Rptr. 645, 648 (1968), the California court held that inmates have no Fourth Amendment rights. It is clear now, by virtue of prisoners' rights litigation, that prisoners do retain their Fourth Amendment rights but only to a very limited degree, i.e. their expectation of privacy upon incarceration is greatly diminished. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974). However, prisoners have no reasonable expectation of privacy in their prison cells. *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194 (1984); *State v. Moorman*, 154 Ariz. 578, 584, 744 P.2d 679, 685 (1987).

The prisoner had no constitutional rights to be present during the cell search . Here, the prisoner had left a dummy in the cell while trying to escape. The court also held that the violation of standard prison regulations was not grounds for suppressing evidence without a Fourth Amendment violation. *State v. Bishop*, 137 Ariz. 361, 670 P.2d 1185 (App. Div. 2 1983).

The principle that prisoners have no reasonable expectation of privacy in their cells and their correspondence in jail applies to pre-trial detainees as well as convicted prisoners. *State v. Martinez,*22 1 Ariz. 383, 212 P.3d 75 (App. Div. 2 2009).

7. Roadblocks

The Tucson police followed Justice Feldman's "suggestions" in *State ex rel. Ekstrom v. Justice Ct. of State*, 136 Ariz. 1, 663 P.2d 992 (1983), and their roadblock was upheld as constitutional. *State v. Super. Ct. In & For County of Pima*, 143 Ariz. 45, 691 P.2d 1073 (1984). The court held that a court must weigh three factors to determine whether a roadblock is a reasonable seizure: "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id*. at 48, 691 P.2d at 1076, citing *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535 (1983); *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979) (roadblocks upheld for driver's license checks.).

8. Persons Transported in Police Vehicles

Persons who must be transported in police vehicles may be frisked or searched without cause for the protection of the officer. *State v. Smith*, 112 Ariz. 531, 544 P.2d 213 (1975) (frisk prior to returning suspect to the scene of his accident); *State v. Kennel*, 26 Ariz.App. 147, 546 P.2d 1156 (App. Div. 1 1976).

9. Schools

School officials may conduct reasonable, warrantless searches of students. Reasonableness is a two-part test asking "whether their action was justified at its inception" and whether "the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 742-43 (1985); *State v. Serna*, 176 Ariz. 267, 860 P.2d 1320 (App. Div. 1 1993).

V. SEIZURES

A. Seizure of Persons (Arrest)

1. Detention

a. Intrusion

When confronted with strange or unusual activities, a police officer, as the public's representative delegated with the responsibility of maintaining law and order, should satisfy himself as to the innocence of the activity by all reasonable, lawful means. We do not believe that an officer, when he commences an investigation, need be convinced the criminal activity is afoot.

"[T]he Supreme Court said that a central concern in balancing these competing considerations has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers." *State v. Jarzab,* 123 Ariz. 308, 311, 599 P.2d 761, 764 (1979), citing *Brown v. Texas,* 443 U.S. 47, 50, 99 S.Ct. 2637, 2640 (1979).

(1) Based on reasonable suspicion that crime is afoot

It is clearly permissible for an officer to detain a suspect when the officer has a reasonable suspicion to believe that the suspect has committed or is about to commit a crime. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968).

A citizen complaint may provide reasonable suspicion to conduct an investigatory stop because the citizen puts his credibility at issue. In contrast, an anonymous tip may not provide reasonable suspicion to stop someone unless the tip provides sufficient underlying circumstances demonstrating the reliability of the information, which may be corroborated by the police. *State v. Canales*, 222 Ariz. 493, 496, 217 P.3d 836,839 (App. Div. 2 2009).

(2) Based on a Wanted Flyer

"If a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information." *United States v. Hensley*, 469 U.S. 221, 232, 105 S.Ct. 675, 682 (1985). If, however, the flyer or bulletin is issued without reasonable suspicion, a stop based on that information will violate the Fourth Amendment. *Id.*

(3) Based on "Strange or Unusual Activities"

In *State v. Jarzab,* 123 Ariz. 308, 599 P.2d 761 (1979), the Arizona Supreme Court adopted a broader test for the legitimation of stops that suggested that police need not suspect criminality. The test permitted officers to make a stop to determine the innocence of a person's actions where "confronted with strange or unusual activities." *Id.* at 311, 599 P.2d at 764. Since then, the court has specifically disapproved *Jarzab* where the language would "permit pursuit and stop, questioning and detention of auto drivers and passengers without a founded suspicion of criminal activity." *State v. Richcreek,* 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997).

(4) To Search for Witnesses

Officer could reasonably stop someone who may have witnessed the defendant's erratic driving. *State v. Childress*, 222 Ariz. 334, 214 P.3d 422 (App. Div. 1 2009).

b Rationale

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. [Detention.] A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. 143, 145-46, 92 S.Ct. 1921 (1972).

For example, in *State v. Master,* 127 Ariz. 210, 619 P.2d 482 (1980), the court held that the initial stop violated appellant's Fourth Amendment rights since his conduct did not constitute "strange or unusual activity", contemplated in *Jarzab,* when he exited a passenger car, which was parked next to a convenience store in a motel lot, and walked toward the store with his hand in his pocket. Thus, the roll of money confiscated from appellant's pocket was suppressed. But where officers on a stake-out observed two men wearing ski masks and heavy coats enter a restaurant carrying what appeared to be sawed off shot guns, then saw them leave running through a vacant field to a car parked in an apartment complex, which sped off faster than the speed limit, there was more than a reasonable suspicion based on articulable facts to justify an investigatory stop. *State v. Brooks,* 127 Ariz. 130, 618 P.2d 624 (App. Div. 1 1980).

Another example of a permissible investigatory stop occurred when the officer had a report of a convenience store robbery, knew that two people in an automobile were involved, and the driver matched the description of the robber. *State v. Snowden,* 138 Ariz. 402, 675 P.2d 289 (App. Div. 2 1983).

c. Scope of Detention

Courts continually emphasize that a stop is limited both in time and space to the purpose of the intrusion. Exceeding the scope of detention converts the detention into an illegal arrest.

(1) Time and Space Limitations

Objective indicies of full custody are an officer's moving the suspect around or holding them for too long a time. *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248 (1979) (suspect brought to the station on reasonable suspicion of murder, held for an hour before confession); *State v. Edwards,* 111 Ariz. 357, 529 P.2d 1174 (1975) (suspect detained for long periods of time).

The reasonableness of the action, in context, is ultimately determinative. In *United States v. Sharpe,* 470 U.S. 675, 105 S.Ct. 1568 (1985), the United States Supreme Court upheld a twenty minute detention of the decoy car until backup officers could stop and search the car containing marijuana. There, the court held that it is appropriate to examine "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant" in assessing whether a detention is too long to be considered an investigatory stop. *Id*. at 686, 105 S.Ct. at 1575.

In *State v. Sweeney*, 224 Ariz. 107, 227 P.3d 868 (App. Div. 1 2010), the court found that the officer's inquiry into the defendant's travels and his reasons for visiting while the officer wrote his traffic citation were not unreasonable. However, when the officer grabbed the defendant's arm and told him he was being detained after refusing to consent to a search of the car, the continued detention to await a drug search dog failed to meet the necessary reasonable suspicion standard. See also *State v. Teagle,* 217 Ariz. 17, 170 P.3d 266 (App. Div. 1 2007).

(2) Exceptions to Scope Rule

Officers may, of course, move a suspect around during a detention:

a) When a crowd is gathering. *United States v. McKendrick*, 409 F.2d 181 (2nd Cir. 1969);

b) Where embarrassment might result in the place. *United States v. Rosenburg*, 458 F.2d 1183 (5th Cir. 1972) (restaurant);

c) When the he suspect agrees to longer detention. *State v. Perez*, 7 Ariz.App. 567, 442 P.2d 125 (1968) (suspect agreed to go to station so officers could check on T.V.'s in the truck);

d) When movement is minimal during traffic stop. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330 (1977) (although this was for traffic offense, rationale is the same – protection); *State v. Solano*, 187 Ariz. 512, 930 P.2d 1315 (App. Div. 1 1996).

d. Factors in Determining Reasonable Suspicion

The determination of whether an officer's suspicion was reasonable must be decided on a case-by-case basis. The following is only an attempt to set out some of the factors courts have considered in their analysis:

(1) Area

a) Gang Area

State v. Johnson, 220 Ariz. 551, 207 P.3d 804 (App. Div. 2 2009) (pat down for weapons during traffic stop of defendant wearing Crips colors in Crips neighborhood).

b) Out-of-Place and/or Stranger in the Area

State v. Leslie, 147 Ariz. 38, 708 P.2d 719 (1985) (dark skinned stranger in small, white town, matched burglar description).

State v. Streyar, 119 Ariz. 607, 583 P.2d 263 (1978) (parked in parking lot at 11:00 p.m. close to 2 banks; no businesses open).

State v. Dean, 112 Ariz. 437, 543 P.2d 425 (1975) (Mexican male in predominantly white middle to upper middle class area).

State v. Nichols, 26 Ariz.App. 455, 549 P.2d 235 (App. Div. 2 1976) (wig, sunglasses, and hat pulled down).

State v. Weitman, 22 Ariz.App. 162, 525 P.2d 293 (App. Div. 1 1974) (white suspect in a predominately black neighborhood).

c) deserted area

State v. Jarzab, 123 Ariz. 308, 599 P.2d 761 (1979).

2)Leaves when officer shows up

State v. Doyle, 117 Ariz. 174, 571 P.2d 671 (1977) (walked away).
State v. Dean, 112 Ariz. 437, 543 P.2d 425 (1975) (drove away).
State v. Baltier, 17 Ariz.App. 441, 498 P.2d 515 (App. Div. 2 1972) (walked hurriedly away; had run away earlier).

3)Furtive movement

State v. Gastello, 111 Ariz. 459, 532 P.2d 521 (1975) (ducked behind a hedge).
State v. Kelley, 107 Ariz. 8, 480 P.2d 658 (1971) (leaned forward in car).
State v. Ramsey, 223 Ariz. 480, 224 P.3d 977 (App. Div.1 2010) (walking fast in neighborhood known for violent, changing direction whenever officers approached).

4)Prior illegal activity

State v. Mosley, 119 Ariz. 393, 581 P.2d 238 (1978) (house where prior search warrants had been served).

5) Profile

State v. Ochoa, 112 Ariz. 582, 544 P.2d 1097 (1976) (vehicle).
State v. Damon, 18 Ariz.App. 421, 502 P.2d 1360 (App. Div. 2 1972) (skyjacker).

6) Matching description

State v. Emery, 131 Ariz. 493, 642 P.2d 838 (1984) (match victim's description is strongly suspicious).
State v. Gastello, 111 Ariz. 459, 532 P.2d 521 (1975) (matched description of purse snatcher).
State v. Nunez, 108 Ariz. 71, 492 P.2d 1178 (1972) (Mexican-American).
State v. Washington, 107 Ariz. 522, 489 P.2d 1201 (1971) (car matching description).
State v. Sheko, 146 Ariz. 140, 704 P.2d 270 (App. Div. 2 1985) (defendant was only person treated; the night burglar was hurt at scene).

7) Nervousness

State v. Dean, 112 Ariz. 437, 543 P.2d 425 (1975).
State v. Turner, 142 Ariz. 138, 688 P.2d 1030 (App. Div. 2 1984) (suspicious behavior towards his luggage after a car accident).

8) Running

State v. Woods, 121 Ariz. 187, 589 P.2d 430 (1979).

e. Detention under Petition and Order

1) Statutory mandate

An officer may obtain judicial authorization under A.R. S. § 13-3905 to detain a suspect for three hours in order to obtain physical characteristics.

2) Rationale

The statute was in response to *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394 (1969), wherein a black rape suspect was taken to the station and fingerprinted. The Supreme Court found the detention unlawful.

3) Constitutionality

A.R.S. § 13-3905 has been ruled constitutional. *State v. Via*, 146 Ariz. 108, 704 P.2d 238 (1985). *State v. Grijalva*, 111 Ariz. 476, 533 P.2d 533 (1975) (fingerprints); *Long v. Garrett*, 22 Ariz.App. 397, 527 P.2d 1240 (App. Div. 2 1974) (fingerprints).

f. Detention Pursuant to Search Warrant

The United States Supreme Court has held that a search warrant allowed the officers to detain the owner of the premises to be searched and force him to accompany them inside while the warrant was served. *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587 (1981).

When a suspect is handcuffed and placed in a chair during the execution of the search warrant, then taken to the police station by 9 SWAT team officers, the detention has become an arrest. *State v. Miller*, 186 Ariz. 314, 320, 921 P.2d 1151, 1157 (1996).

Visitors may not be detained absent an articulable reason for detention. *State v. Carrasco*, 146 Ariz. 558, 711 P.2d 1231 (App. Div. 1 1985).

g. Handcuffing and Other Means of Physical

Detention See *State v. Miller, supra.*

Handcuffs or use of force, by itself, does not automatically transform a stop into an arrest if the officer fears for his personal safety. *State v. Romero*, 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. Div. 1 1993).

2 Arrest

a.Probable cause

An arrest by an officer is proper only when probable cause exists, i.e. facts and circumstances which would lead a reasonably cautious officer to believe a crime had been committed and that the suspect committed it. *State v. Buccini*, 167 Ariz. 550, 559, 810 P.2d 178, 187 (1991), citing *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171 (1959).

b. Custody

Custody is based upon an objective standard, not necessarily what the officer thought or said. *State v. Taylor*, 112 Ariz. 68, 537 P.2d 938 (1975).

c.Arrest Warrants - Residences

A suspect may be arrested without a warrant unless he is inside a residence. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820 (1976).

A suspect may not be arrested in a residence without a warrant unless exigent circumstances exist. *State v. Ferguson*, 119 Ariz. 55, 579 P.2d 559 (1978) (reasonable cause to believe murderer was armed, dangerous, and on the move).

The gravity of the underlying offense is a major factor in determining whether police may enter a home and make a warrantless arrest. An entry to arrest a DWI offender was impermissible when the officers were not in immediate hot pursuit, and the offense did not even carry jail time. *Welsh v. Wisconsin*, 466

U.S. 740, 104 S.Ct. 2091 (1984).

Consent may validate the entry. In *State v. Alder*, 146 Ariz. 125, 704 P.2d 255 (App. Div. 2 1985), police already had probable cause to arrest the defendant when they encountered him outside his office/home. Defendant consented to going inside to talk, and his warrantless arrest inside was proper.

Arizona police officers may enter defendant's residence to arrest him when they have knowledge of an out of state warrant for his arrest. Officers did not have to get an Arizona warrant before arresting defendant in his Arizona residence. *State v. Reasoner*, 154 Ariz. 377, 742 P.2d 1363 (App. Div. 2 1987).

d. Forcible Entry

(See the Search Warrant Chapter)

e. Misdemeanor Arrests

An officer may arrest for a misdemeanor committed in his presence or not in his presence where he has probable cause to believe the person committed it. A.R.S. § 13-3883.

The officer must release the arrested person if:

1) The officer did not witness the crime (unless traffic accident and violation of Title 28).

2) The arrestee signs a promise to appear.

B. Seizure of Property

Crime-related property may be seized by an officer if the officer is in a lawful position to see it. There must be a nexus between the item seized and criminal behavior. *Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 1650 (1967).

If, however, an officer is located outside of an area wherein a person reasonably expects privacy, he may not seize the property inside without a warrant. *State v. Sauve*, 112 Ariz. 576, 544 P.2d 1091 (1976). In *Sauve* officers saw crime-related property in the back seat of an unoccupied car parked in the defendant's driveway. The Court ruled the warrantless seizure unlawful.

VI. THE EXCLUSIONARY RULE

This section deals only with circumstances where evidence is obtained by virtue of or through the exploitation of an illegal search or seizure. (For a discussion of the Rule as it applies to a violation of Fifth Amendment Right, see the Prosecutor's Manual Vol. I, Admissibility of a Defendant's Statements.)

A. The Rule

Evidence obtained in violation of the defendant's Fourth Amendment Rights is inadmissible in a state criminal proceeding. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).

B. Scope of the Rule - Derivative Evidence (Fruit of the Poison Tree)

Evidence, which has been found by "exploitation" of an illegal act of law enforcement must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417 (1963).

In order to suppress derivative evidence, there must be a nexus between the police misconduct and the crime for which the defendant is tried. *State v. Booker*, 212 Ariz. 502, 504, 135 P.3d 57, 59 (App. Div. 1 2006).

The defendant was seized at his neighbor's home as the result of a jail inmate's tip. After *Miranda* warnings and an hour's interrogation, the defendant confessed. The confession was suppressed because the confession was the result of the exploitation of an illegal arrest. *Dunaway v. N.Y.*, 442 U.S. 200, 99 S.Ct. 2248 (1979). See also *State v. Cook*, 115 Ariz. 189, 195, 564 P.2d 877 (1977).

The defendant and his companion went to the police station to visit a friend who was incarcerated. The companion was arrested pursuant to a warrant (later determined to be invalid). The companion handed a marijuana cigarette to the defendant who was then also arrested. The defendant's arrest was upheld because it was not an exploitation of the illegal arrest. *State v. Kriley*, 114 Ariz. 587, 562 P.2d 1085 (App. Div. 2 1977).

C. Independent Source, Attenuation, Purging of Taint

The state may avoid the exclusionary rule in several ways.

1 .Independent Source

> The essence of a provision forbidding the acquisition of evidence in a certain way does not mean that facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . .

Wong Sun v. U.S., *supra*, 371 U.S. at 495 (emphasis added). *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1920) (root of "independent source" test).

"The basic premise of the independent source doctrine is that the police should not be placed in a worse position than they would have been in, absent the illegal conduct." *State v. Gulbrandson*, 184 Ariz. 46, 58, 906 P.2d 579, 591 (1995).

Although the officers had illegally secured the house, the evidence from the search was admissible because the search warrant had been issued on information that was independent from the illegal entry. *State v. Bolt*, 142 Ariz. 260, 689 P.2d 519 (1984). See also *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380 (1984).

The defendant consented only to the officer's viewing the defendant's residence from the doorway. The officer, after seeing a coat which matched that of the one worn by the robber, entered the residence and compared buttons on the coat with a button found at the scene. Evidence was suppressed. *State v. Cobb*, 115 Ariz. 484, 566 P.2d 285 (1977).

Police obtained search warrant for defendant's property in jail and personally served it. During the service, police asked where they could find the information they needed and the defendant told them where to look. The conversation violated the defendant's right to counsel but, because police had a warrant for the property in which they found the information sought, there was an independent source for the information and the motion to suppress was denied. *State v. Hackman*, 189 Ariz. 505, 943 P.2d 865 (App. Div. 1 1997). See also *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004).

Defendant was illegally stopped in an airport concourse. A drug detecting dog alerted to the presence of marijuana, which was seized. The court found that the discovery of the marijuana was legal because police did not need reasonable suspicion to use the dog to examine luggage in the custody of airline personnel. *State v. Houpt*, 169 Ariz. 550, 821 P.2d 211 (App. Div. 2 1991).

2. Inevitability of Discovery

The inevitable discovery doctrine is a logical and important extension of the independent source test. The doctrine permits the admissibility of illegally-seized evidence if the government can show the inevitability of discovery. The inevitable discovery doctrine does not apply to evidence seized in Arizona homes due to the privacy provision in Art. 2, Sec. 8 of the Arizona Constitution. *State v. Ault*, 150 Ariz. 459, 724 P.2d 545 (1986).

Illegally obtained physical evidence may be admitted if the State can demonstrate by a preponderance of the evidence that such evidence inevitably would have been discovered by lawful means. *State v. Davolt*, 207 Ariz. 191, 204, 84 P.3d 456, 469 (2004), citing *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501 (1984); *State v. Lamb*, 116 Ariz. 134, 138, 568 P.2d 1032, 1036 (1977).

a. Arizona Cases

Officers received a call that a man had a gun in his hotel room. The girl who precipitated the call met the officer and told them that the defendant had a gun. The officer, after seeing a bulge in the defendant's pocket frisked him, then pulled a small cigar box out of the pocket. The officer looked into the box and observed pills. The defendant was then arrested and other evidence obtained incident to arrest. An officer arrived at the scene and reminded the officers there about a drug store robbery. The officers then realized that the defendant fit the perpetrator's description. The evidence seized incident to arrest, was the result of an illegal search. But ". . . the arrest for robbery itself was inevitable as was the search incident to arrest. . . ." the evidence was admissible. *State v. Lamb*, 116 Ariz. 134, 568 P.2d 1032 (1977). See also *State v. Tillery*, 107 Ariz. 34, 481 P.2d 271 (1971) cert. denied 404 U.S. 847 (1971). See *State v. Ochoa*, 131 Ariz. 175, 639 P.2d 365 (App. Div. 2 1981).

Bullhead City police searched defendant's luggage that was temporarily placed in an Las Vegas police officer's patrol car after he was arrested with it. The Bullhead City officers found the bloody clothes the defendant was wearing in the luggage. The court found that the clothing was admissible because it would have inevitably been found in an inventory search during booking at the Las Vegas jail. *State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996).

Search of the defendant's car incident to arrest was illegal but drugs seized therein were admissible on inevitable discovery doctrine because they would have been found in an inventory search. *State v. Rojers*, 216 Ariz. 555, 169 P.3d 651 (App. Div. 1 2007).

Defendant's blood stained shoes were seized without a warrant prior to his arrest. Arresting officer testified that he would have arrested the defendant even if he had not seen the bloody shoes. After arrest, the defendant would have had to surrender his clothing to exchange for jail garb. Accordingly, the blood-stained shoes would have been discovered by police regardless of illegal pre-arrest seizure. *State v. Paxton*, 186 Ariz. 580, 925 P.2d 721 (App. Div. 1 1996).

b. Federal Jurisdiction

Defendant's illegally obtained statements did not require suppression of the dead body where the prosecutor established that the victim's body would have been ultimately or inevitably discovered. In addition, prosecution is not required to prove absence of bad faith. *Nix v. Williams*, 467 U.S. 431, 104

S.Ct. 2501 (1984).

3. Purging the Taint

> Evidence is not classified as a fruit [of the poisonous tree] requiring exclusion, however, merely because it would not have been discovered 'but for' the primary invasion: Rather, the more apt question in such a case is whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint...
>
> That degree of "attenuation" which suffices to remove the taint from evidence obtained directly as a result of unlawful police conduct requires at least an intervening independent act by the defendant or a third party which breaks the causal chain linking the illegality and evidence in such a way that the evidence is not in fact obtained "by exploitation of that illegality." Consent by the defendant, if sufficiently an act of free will to purge the primary taint of the unlawful [arrest] may produce the requisite degree of attenuation.

State v. Fortier, 113 Ariz. 332, 335, 553 P.2d 1206, 1209 (1976), citing *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 416 (1963).

"Consent is of little significance when there are no intervening circumstances between the illegal arrest and the consent." *State v. Monge*, 173 Ariz. 279, 281, 842 P.2d 1292, 1294 (1992).

To determine whether the seizure of evidence is sufficiently attenuated from the illegal conduct, the court must consider (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) particularly, the purpose and flagrancy of the official misconduct. *State v. Guillen*, 223 Ariz. 314, ¶ 14, 223 P.3d 658, 661 (2010), citing *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S.Ct. 2254 (1975).

In *State v. Washington*, 120 Ariz. 229, 585 P.2d 249 (App. Div. 1 1978), several defendants were illegally arrested and searched. Prior to the suppression of the evidence one defendant pled guilty and testified before the grand jury against his co-perpetrators. Those co-perpetrators appealed. The Court of Appeals remanded to find out whether the change of plea was the result of coercive influences (especially of) the prosecutor. The test is not a "but for" test. The test is whether sufficient circumstances intervened to purge the taint. *State v. Master*, 135 Ariz. 560, 663 P.2d 244 (App. Div. 1 1983).

4. The Good Faith Exception

Evidence will not be suppressed where the officers acted with objective good faith in reliance on a warrant or a magistrate. A.R.S. § 13-3925. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984); *Massachusetts v. Shepard*, 468 U.S. 981, 104 S.Ct. 3424 (1984); *State v. Mincey*, 130 Ariz. 389, 636 P.2d 637 (1981), cert. den. 455 U.S. 1003 (1981); *State v. Hanee*, 155 Ariz. 114, 745 P.2d 172 (App. Div. 1 1987). See *State v. Osbond*, 128 Ariz. 76, 623 P.2d 1232 (1981) (exclusionary rule not applied to statements on murder case because defendant was in jail on a bad arrest for other charges when he confessed).

"Each time the exclusionary rule is applied it exacts a substantial cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at

trial is deflected." *Rakas v. Illinois*, 439 U.S. 128, 137, 99 S.Ct. 421, 427 (1979). The United States Supreme Court applied the good faith exception where officers relied on an apparently valid statute. On appeal, prosecutors conceded the statute's unconstitutionality, but the same term a similar statute was upheld in *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636 (1987) (wrecking yard administrative search).

Along the way the court said the purpose of the exclusionary rule is to "deter future unlawful police conduct." Enforcement of the exclusionary rule is "properly restricted to those situations in which its remedial purpose is effectively advanced." *Illinois v. Krull*, 480 U.S. 340, 346-47, 107 S.Ct. 1160, 1165-66 (1987).

D. Use of Illegally Seized (Suppressed) Evidence For Impeachment

Evidence which was illegally seized may be used for impeachment! *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912 (1980). *State v. Menard,* 135 Ariz. 385, 661 P.2d 649 (App. Div. 2 1983).

E. Use of Illegally Seized (Suppressed) Evidence for Probation Revocations

"We are asked here to decide whether the exclusionary rule applies in probation revocation proceedings. We hold that it does not and anything to the contrary ... is disapproved." *State v. Alfaro,* 127 Ariz. 578, 623 P.2d, 8 at 9 (1981).

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